

EVIDENTIARY HEARING  
BEFORE THE  
CALIFORNIA ENERGY RESOURCES CONSERVATION  
AND DEVELOPMENT COMMISSION

In the Matter of:	)	
	)	
Application for Certification	)	Docket No.
for the Morro Bay Power Plant	)	00-AFC-12
Project	)	
_____	)	

VETERANS MEMORIAL BUILDING  
209 SURF STREET  
MORRO BAY, CALIFORNIA

TUESDAY, MARCH 12, 2002

9:20 a.m.

Reported by:  
James A. Ramos  
Contract No. 170-01-001

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

COMMITTEE MEMBERS PRESENT

William Keese, Presiding Member

HEARING OFFICER AND ADVISORS PRESENT

Gary Fay, Hearing Officer

Terry O'Brien, Adviser to Chairman Keese

STAFF AND CONSULTANTS PRESENT

Caryn Holmes, Staff Counsel

Marc Pryor, Project Manager

Mark Hamblin

Alvin Greenberg

Michael Ringer

Magdy Badr

Obed Odoemelam

Susan Walker

Aspen Environmental Group

PUBLIC ADVISOR

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APPLICANT

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Jeffery D. Harris, Attorney

Ellison, Schneider and Harris

Andrew L. Trump, Director of Business Development  
Western Region

Robert E. Cochran, II, Project Manager  
Duke Energy North America

Peter Okurowski, Senior Associate  
California Environmental Associates

APPLICANT

Robert C. Mason, Vice President  
Eric G. Walther, Vice President  
TRC

Gary S. Rubenstein  
Sierra Research

Kirk Marckwald, Founder and Principal  
California Environmental Associates

Jeff Ferber, Principal  
RRM Design Group

Paul Curfman, Associate  
EDAW, Inc.

Ronald E. Van Buskirk, Attorney  
Pillsbury Winthrop, LLP

INTERVENORS

Robert Schultz, City Attorney  
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Henriette Groot, President  
Bonita L. Churney, Attorney  
Pamela Soderbeck  
Gordon Hensley  
Coastal Alliance on Plant Expansion

ALSO PRESENT

Dan Chia  
California Coastal Commission

Gary E. Willey, Engineer  
San Luis Obispo County Air Pollution Control  
District

Larry Sheers

Doris Murray

ALSO PRESENT

Todd Barnes

David Nelson

Don Boatman

Nelson Sullivan

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## P R O C E E D I N G S

9:20 a.m.

HEARING OFFICER FAY: We're on the  
record.

PRESIDING MEMBER KEESE: Good morning.  
I'm Bill Keese and pleased to be here again. I am  
now chairing this Committee on siting with action  
taken by the Energy Commission about ten days ago.

Commissioner James Boyd has been  
appointed number two on this Committee and will be  
participating in the future. He is chairing a  
two-day workshop in Sacramento today.

I was not here two weeks ago when this  
hearing on the air issue ended abruptly. I want  
to apologize for the way that occurred, and I  
would like to let you know that the Governor's  
Office personally apologized for the process that  
took place to Commissioner Moore, who learned  
about it moments before the hearing ended. And to  
me, who didn't learn about it until a new  
Commissioner had been appointed. That is not the  
process the Governor's Office goes through. They  
apologize.

So we have to live with it. It was very  
unfortunate that that hearing had to be



1 interrupted in the manner it did. We will start  
2 again where that hearing left off. Mr. Fay will  
3 handle it because he was here participating at  
4 that time. We'll be as flexible as we can in  
5 handling this issue.

6 Mr. Fay.

7 HEARING OFFICER FAY: Thank you,  
8 Commissioner. A few preliminary matters. Today  
9 we begin -- well, we continue with our hearing on  
10 air quality and public health. When we left off  
11 intervenor CAPE was cross-examining the staff  
12 panel. And when we start again they will pick up  
13 again on that.

14 This hearing was noticed by written  
15 notice sent out February 13th, and indicated the  
16 various dates for the process as far as we can  
17 anticipate it. It also included an attachment A  
18 that can serve as your agenda, however, there have  
19 been a few changes to that. And so there is a  
20 more current agenda in back. And I've given it to  
21 the parties.

22 Later changes include after we finish  
23 the cross-examination and recross, as necessary,  
24 on air quality and public health. And then take  
25 the CAPE witnesses on that topic, we're going to

1 have a brief rebuttal from staff on the issue of  
2 hydrazine versus carbohydrazide use at the plant.  
3 That was discussed previously when we were dealing  
4 with hazardous materials. And then we'll move to  
5 land use, the topic of land use.

6 Tomorrow we'll begin with, assuming that  
7 we finish land use today, the first topic will be  
8 soil and water resources tomorrow; followed by  
9 visual resources. And if we complete all those,  
10 we'll begin our scheduling conference.

11 We do have Thursday, March 14th, to use  
12 if necessary, if things go too late.

13 I just want to mention for the parties  
14 that subsequent to the last hearing CAPE filed a  
15 request for a subpoena, and we received written  
16 argument from the various parties on that matter.  
17 And the Committee denied the subpoena. And so  
18 CAPE will resume with cross-examination of the  
19 staff panel and with witnesses that they have  
20 previously identified.

21 Any other preliminary matters before we  
22 get started? Ms. Holmes.

23 MS. HOLMES: Two preliminary matters.  
24 First, it's my understanding from talking with the  
25 parties that nobody has any cross-examination of

1 Dr. Greenberg on the carbonylhydrazide versus  
2 hydrazine use. So it might be more efficient to  
3 simply take that first and release him, since he  
4 doesn't need to be here for the rest of the  
5 hearings.

6 The second issue has to do with the fact  
7 that staff would like to ask some questions that  
8 are really in the nature of soil and water  
9 rebuttal questions of Mr. Willey while he is here.

10 In Duke's prefiled testimony on soil and  
11 water resources they indicated that there are  
12 limitations on water use that are imposed by  
13 virtue of the Air District's permitting  
14 conditions. And as Mr. Willey is here today, I  
15 thought it would be an appropriate time, rather  
16 than making him come back another day, to ask him  
17 questions about what those permit limits are and  
18 how they work with respect to duct firing.

19 It's my understanding that the parties  
20 don't have an objection to staff asking those  
21 questions today.

22 HEARING OFFICER FAY: Is there any  
23 objection to staff addressing those questions?

24 MR. HARRIS: No, there's not. There is  
25 one additional matter for the applicant and that

1 would be our hydrazine versus carbohydrazide  
2 testimony, as well. But that, as well as staff's,  
3 can be marked as exhibits and accepted as  
4 testimony under declaration today.

5 HEARING OFFICER FAY: Okay. Why don't  
6 we -- Ms. Holmes, would it work for Mr. Willey to  
7 be questioned when and after you conduct your  
8 rebuttal?

9 MS. HOLMES: It would probably be  
10 easiest for us if Mr. Willey were to testify at  
11 the conclusion of staff's presentation. But that  
12 does break up the air quality section, since CAPE  
13 hasn't finished yet.

14 As long as CAPE is finished by two, it's  
15 my understanding that he could testify as late as  
16 that. But, again, our preference would be to have  
17 him testify when the staff panel on air quality is  
18 finished.

19 I guess that didn't make sense. Staff  
20 is in the middle of testifying on air quality. At  
21 the conclusion of that, my understanding is the  
22 Committee will turn to CAPE and have CAPE testify  
23 on air quality and public health.

24 Mr. Willey could provide his question on  
25 permit limitations, his answers to my questions on

1 permit limitations either at the conclusion of  
2 staff's air quality/public health testimony, or at  
3 the conclusion of all of the air quality/public  
4 health testimony, that is when CAPE is finished.

5 HEARING OFFICER FAY: Okay. I think if  
6 CAPE will indulge us, I'd like to do it at the  
7 conclusion of the staff's presentation. Kind of  
8 keep that together. Does that work?

9 MS. CHURNEY: That's fine, Mr. Fay, yes.

10 HEARING OFFICER FAY: Okay.

11 MS. CHURNEY: Yes, and I have a few  
12 additional issues, as well.

13 HEARING OFFICER FAY: Yes.

14 MS. CHURNEY: On the agenda that was  
15 just passed out this morning I noticed that you  
16 indicated 45 minutes for CAPE's testimony on air  
17 quality/public health. And actually we had an  
18 hour and 55 minutes left of what we had originally  
19 estimated. So, I don't know that we'll use all of  
20 that time, but I do believe that we have reserved  
21 that much time, which larger than the 45 minutes  
22 indicated.

23 HEARING OFFICER FAY: Okay, I think that  
24 estimate was a result of a revision we received  
25 some time ago from you, but we'll be flexible on

1       that.

2               MS. CHURNEY:  No, you didn't receive it  
3       from us.  I can assure you of that.

4               Secondly, just so that you're aware and  
5       it's on the record, we have filed a petition for  
6       reconsideration and a petition for full Commission  
7       hearing with respect to our subpoena request.

8               That was sent for filing on Friday, so  
9       it may not have hit your desk.  But I did want you  
10      to be aware of that.

11              And finally I, once again, have been  
12      left off the service list.  I just received a  
13      revised service list and my name and address are  
14      not there.  So, if you're the person to notify,  
15      I'm giving you notice.  But I can send a note to  
16      Maggie Read, as well.

17              HEARING OFFICER FAY:  Okay, that would  
18      help, thank you.  We apologize for the oversight.  
19      Yes.

20              MR. HARRIS:  I wasn't clear on CAPE's  
21      hour and 55 minutes.  Was that for their continued  
22      cross, or for their direct?

23              MS. CHURNEY:  No, that's for direct.

24              HEARING OFFICER FAY:  This agenda is  
25      only for a guideline and we certainly hope people

1 don't feel the need to exhaust all the time that's  
2 been allotted to them.

3 All right. Any other preliminary  
4 matters then? Okay, I'd like to adopt Ms. Holmes'  
5 suggestion and have Mr. Greenberg's testimony  
6 introduced, and the applicant's, as well. Do you  
7 want to move that in, Mr Harris.

8 MR. HARRIS: I would move into --  
9 actually have it marked as an exhibit and moved  
10 into evidence, the filing made by Duke on the 15th  
11 related to the two issues we talked about.

12 HEARING OFFICER FAY: And what is the  
13 topic of that document?

14 MR. HARRIS: It's the carbonylhydrazide  
15 versus the hydrazine document that was filed by  
16 the applicant on the 15th.

17 HEARING OFFICER FAY: And has that  
18 previously been marked?

19 MR. HARRIS: No, it has not. I'd like  
20 it to be assigned an exhibit number, please.

21 HEARING OFFICER FAY: Okay. That will  
22 be marked as exhibit 176.

23 MR. HARRIS: And we have copies being  
24 extricated from a car as we speak. We'll make  
25 those available. But it's already previously been

1 filed and served.

2 HEARING OFFICER FAY: Are you moving it  
3 at this time?

4 MR. HARRIS: I would like to move it at  
5 this time, yes.

6 HEARING OFFICER FAY: Okay, Would you  
7 please read the entire title to us, then. Do you  
8 have that before you?

9 MR. HARRIS: Let me get that. It's  
10 being retrieved as we speak.

11 HEARING OFFICER FAY: All right, let me  
12 save some time here. It's on TRC stationery,  
13 addressed to Kae Lewis, dated February 15th. Re:  
14 Morro Bay Power Plant Modernization Project.  
15 Transmittal information on Carbohydrazide and  
16 Feedwater Chemistry Problems at the Duke Energy --  
17 Plant. Is that the document?

18 MR. HARRIS: First it would be TRC --  
19 can you give us a moment to check the document in  
20 front of us? There's some confusion on this item  
21 as to whether that is the actual document.

22 HEARING OFFICER FAY: And your question  
23 is? I'm sorry.

24 MR. HARRIS: If I could have a moment to  
25 get the --



1 HEARING OFFICER FAY: Certainly. Let's  
2 go off the record.

3 (Off the record.)

4 HEARING OFFICER FAY: We're back on the  
5 record.

6 MR. HARRIS: The document is dated  
7 February 15th; it's on the letterhead of TRC.  
8 It's a letter to Kae Lewis. The re line reads  
9 Morro Bay Power Plant Modernization Project 00-  
10 AFC-12. And the title is Transmittal Information  
11 on Carbohydrazide and Feedwater Chemistry Problems  
12 at Duke Energy -- Independence Plant.

13 HEARING OFFICER FAY: And that's marked  
14 exhibit 176.

15 MR. HARRIS: Correct.

16 HEARING OFFICER FAY: Any objection --  
17 well, you move that document at this time?

18 MR. HARRIS: Yes, I move that document.

19 HEARING OFFICER FAY: As the testimony  
20 of Dr. Walther?

21 MR. HARRIS: Yes, I would, thank you.

22 HEARING OFFICER FAY: So moved. Is  
23 there any objection?

24 MS. HOLMES: No objection from staff.

25 MS. CHURNEY: No objection.

1 MR. SCHULTZ: No objection from the  
2 City.

3 HEARING OFFICER FAY: Without objection  
4 that will be received in the record at this time.

5 Can we move to staff's submittal, then?

6 MS. HOLMES: Thank you. Staff's  
7 submittal came as part of a package. There were a  
8 couple of documents that were included. The cover  
9 is in memorandum form to Chairman Keese from  
10 myself. It's dated March 5th.

11 What I'd like to do is to simply have  
12 the part that begins on the next page, hydrazine  
13 versus carbohydrazide testimony of Alvin  
14 Greenberg, PhD., marked as an exhibit. The reason  
15 for that is that there's also a revision to  
16 another section of the FSA that's part of that  
17 document.

18 And finally, I would point out that at  
19 the end of the latter revision there apparently  
20 was printed some additional testimony that we  
21 didn't intend to file on hydrazine and  
22 carbohydrazide, so that should be ignored.

23 I think it would be simplest simply to  
24 label the testimony of Dr. Greenberg as found on  
25 page 1 and 2 immediately after the cover sheet as

1 the exhibit that we're seeking to enter into  
2 evidence.

3 HEARING OFFICER FAY: Is it correctly  
4 identified under exhibit 171 on the exhibit list?

5 MS. HOLMES: Right, with the  
6 understanding that the additional language that  
7 was inadvertently attached to the soil and water  
8 section if not to be included.

9 HEARING OFFICER FAY: Okay.

10 MS. HOLMES: It's just page 1 and 2.

11 HEARING OFFICER FAY: Okay, with that  
12 correction, is there any objection to receiving  
13 Dr. Greenberg's testimony labeled as exhibit 171?

14 I hear none, so that will be entered.

15 MR. HARRIS: Mr. Fay.

16 HEARING OFFICER FAY: Go ahead.

17 MR. HARRIS: Can we be off the record  
18 for just a moment?

19 HEARING OFFICER FAY: Sure.

20 (Off the record.)

21 HEARING OFFICER FAY: We just received,  
22 without objection, exhibit 136, corrections to  
23 hazardous material management testimony and  
24 technical appendix, docketed January 22, 2002.

25 All right, then we thank you,

1 Mr. Greenberg. You're excused.

2 Anything further, then, before we return  
3 to CAPE's cross-examination of the staff panel on  
4 air quality and public health?

5 All right. Ms. Churney, go ahead.

6 CROSS-EXAMINATION - resumed

7 BY MS. CHURNEY:

8 Q Mr. Ringer, is it a goal of staff to  
9 determine the overall air quality health impacts  
10 from the project?

11 MR. RINGER: Could you repeat the  
12 question?

13 MS. CHURNEY: Is it a goal of staff to  
14 determine the overall air quality health impacts  
15 from the project?

16 MR. RINGER: In general, yes.

17 MS. CHURNEY: And in pursuing that goal  
18 is it appropriate to simply add up the total of  
19 all four criteria pollutants in tons per year from  
20 the existing plant and compare the old plant and  
21 the new plant?

22 MR. RINGER: No.

23 MS. CHURNEY: And is that done by staff?

24 MR. RINGER: No.

25 MS. CHURNEY: And why is that?

1 MR. RINGER: The tonnages emitted by the  
2 plant, in and of themselves, do not mean anything.  
3 What we're interested in are the impacts. And in  
4 order to get at the impacts you have to look at  
5 the concentrations of the pollutants.

6 MS. CHURNEY: And is that why staff  
7 analyzes each of these pollutants separately?

8 MR. RINGER: There's a number of  
9 reasons. We analyze the pollutants separately in  
10 order to examine whether or not the ambient air  
11 quality standards are met for each pollutant.

12 We also look -- again, you're talking  
13 criteria pollutants. We also look at the  
14 noncriteria pollutants, and we examine whether or  
15 not those have any health effects, as well.

16 MS. CHURNEY: Are you aware of a series  
17 of statements made by Duke representatives in  
18 various public forums that simply refer to quote,  
19 reduced air emissions with the new plant compared  
20 to the existing plant?

21 MR. HARRIS: We'd object to that being  
22 outside the scope of any of the testimony.

23 MS. CHURNEY: Well, I'd like to ask the  
24 preliminary question, and then I'll ask did you  
25 take these statements into account in staff's

1 analysis.

2 HEARING OFFICER FAY: We're going to  
3 overrule the objection and let Ms. Churney pursue  
4 this, at least until we determine what she is  
5 after.

6 MS. HOLMES: Can I ask a question of  
7 clarification? I guess I'm uncertain about  
8 whether or not she's talking about where these  
9 statements occurred, or when they occurred.

10 MS. CHURNEY: I guess that's not the  
11 important part of my question is whether staff was  
12 aware of these statements, wherever they occurred,  
13 and took them into account in their analysis.

14 Do you need the question repeated again?

15 MR. RINGER: I'm vaguely aware that some  
16 such statements have been made. I'm not aware of  
17 the detail of the statements, themselves, or where  
18 in particular they were made.

19 I'm aware that there has been some  
20 statements to the effect that the new plant may  
21 have lower emissions than the old plant.

22 MS. CHURNEY: Did you take those  
23 statements into account in your analysis for  
24 staff?

25 MR. RINGER: We did not.

1 MS. CHURNEY: And why is that?

2 MR. RINGER: From the CEQA point of view  
3 and from an overall health impacts point of view  
4 that's not our concern whether or not the impacts  
5 relative to the old plant are higher or lower.  
6 But rather whether or not they cause or have the  
7 potential to cause any significant health effects  
8 in and of themselves.

9 MS. CHURNEY: Did staff take into  
10 account the stated objectives of this project in  
11 terms of air quality impacts in making its  
12 assessments and recommendations on air quality,  
13 and specifically I'll refer you to a section of  
14 the MOU between the City and Duke in section 2 of  
15 the AFC. And this is at page 2-10 to 2-12. That  
16 the project would not impose any significant risk  
17 on the citizens of Morro Bay resulting from actual  
18 air emissions within the City.

19 MS. HOLMES: Can we just break that down  
20 and ask first of all if he's aware of that --

21 MS. CHURNEY: Sure.

22 MS. HOLMES: -- in the AFC?

23 MS. CHURNEY: Sure. Have you --

24 MR. RINGER: -- the MOU?

25 MS. CHURNEY: The MOU is referred to in

1 the AFC, and are you aware of what that provides?

2 MR. RINGER: I have to speak with  
3 somebody who's overseeing the public health  
4 section -- somebody who actually did it. But it's  
5 not our -- I don't think that we looked at the MOU  
6 in particular.

7 And, again, that's because of the fact  
8 that the new versus old was not as important to us  
9 as the absolute impact of the proposed facility.

10 MS. CHURNEY: Maybe if I could ask the  
11 same question to Mr. Badr.

12 MR. BADR: And I have the same answer as  
13 Mr. Ringer.

14 MS. CHURNEY: In the FSA, page 3.1-17  
15 staff states that, quote: staff expects the  
16 impacts from normal operations of the proposed  
17 facility will be less than the maximum project  
18 impact modeled. However, staff cannot reach a  
19 conclusion that the proposed facility's impacts  
20 will be lower than the old facility."

21 Do you recall that statement? And I'll  
22 direct this to Mr. Badr, sorry.

23 MR. BADR: And you said it's in --

24 MS. CHURNEY: It's 3.1-17.

25 MR. BADR: Yes.



1 MS. CHURNEY: And in reaching that  
2 conclusion did staff take into account in its  
3 analysis the published promises of Duke to Morro  
4 Bay residents that the new plant will result in  
5 improved air quality?

6 MR. BADR: Well, I think the statement  
7 here doesn't have any relationship with the  
8 statement you are making about what Duke said or  
9 didn't say. All what we are saying here is that  
10 the normal operation of this power plant, after  
11 it's been up and running, in normal operation the  
12 impact would be much lower than what's presented  
13 in the table. Meaning the table is over-  
14 emphasizing what the impact is. And the reason is  
15 because -- worst case scenario of estimating the  
16 amount of emissions and the conditions where these  
17 emissions have maximum -- so therefore the maximum  
18 impact is much higher.

19 However, at normal operation when the  
20 project is running and without -- normal course,  
21 it's impact would be much lower than what's  
22 presented here. That's all what the statement  
23 means.

24 MS. CHURNEY: Referring now to the  
25 nonconstruction air quality conditions, did staff

1 make any substantive changes to the FDOC  
2 conditions other than adding verification  
3 requirements?

4 MR. BADR: No, -- what conditions are  
5 you referring to?

6 MS. CHURNEY: The conditions proposed by  
7 staff, other than the construction-related  
8 conditions.

9 MR. BADR: Oh, the rest of them. No,  
10 they are exactly like the --

11 MS. CHURNEY: I'd like to direct my next  
12 set of questions to Mr. Gary Willey.

13 And considering first the emission  
14 reduction credits, Mr. Willey, before the new  
15 plant can start operations, the existing plant  
16 will cease operations, as I understand it, is that  
17 correct?

18 MR. WILLEY: That's correct.

19 MS. CHURNEY: And let's call the last  
20 day of the existing plant's operations day number  
21 one. And the --

22 MS. HOLMES: Can you repeat that?

23 MS. CHURNEY: Let's call the last day of  
24 the existing plant's operations day number one.  
25 And the first day of the new plant's operations at

1 maximum capacity day number two.

2 And even with the emission reduction  
3 credits that are being obtained by Duke, will the  
4 actual PM10 emissions be higher on day one or day  
5 two?

6 MR. WILLEY: That question I would have  
7 to make quite a bit of assumptions on, how the old  
8 plant was operating, and how the new plant was  
9 operating, so I need a little more clarification  
10 on that.

11 MS. CHURNEY: Well, with the new plant,  
12 it will be operating at maximum capacity. And  
13 with the old plant, make the same assumption,  
14 maximum allowable capacity given the air quality.  
15 The existing level allowed at the baseline.

16 MR. WILLEY: And one more question for  
17 you on that. Are you talking about groundlevel  
18 impacts, or are you talking about stack emissions?

19 MS. CHURNEY: Let's talk about emissions  
20 first.

21 MR. WILLEY: From the emissions point of  
22 view the existing plant at full capacity will  
23 essentially be the same.

24 MS. CHURNEY: And let's use the same  
25 analysis with respect to concentrations, making

1 the same assumptions.

2 MR. WILLEY: I can't say on every point  
3 the new plant would be greater, but on most  
4 locations in town there would be a calculated  
5 increase, not necessarily what we observe. Like  
6 I've said before, I don't think we could tell the  
7 difference between the two plants when they're  
8 actually up and running, the background  
9 concentrations so overwhelm what's coming out of  
10 the power plant that it would be very hard to  
11 distinguish actually monitoring those levels.

12 MS. CHURNEY: But there would be an  
13 increase?

14 MR. WILLEY: That's what we have  
15 modeled, yes.

16 MS. CHURNEY: And do you recall in the  
17 testimony earlier by Mr. Rubenstein regarding his  
18 recommended approach to PM10 emissions source  
19 testing methodology, that is EPA201A for front  
20 half PM10 and EPA8 for back half of PM10  
21 measurement?

22 MR. WILLEY: Yes, I remember that.

23 MS. CHURNEY: Did Mr Rubenstein or Duke  
24 request that methodology be used by the APCD for  
25 the new Morro Bay Power Plant?

1 MR. WILLEY: They did not directly  
2 request that. We had meetings with them where  
3 Gary had outlined that method, that, you know,  
4 they would consider using it.

5 But it's not an accepted EPA method. We  
6 wouldn't use it until it was.

7 MS. CHURNEY: So that you do not agree  
8 to use that methodology for that reason?

9 MR. WILLEY: Correct, at this point.

10 MS. CHURNEY: What did the District  
11 require in its condition 17 for methodology?

12 MR. WILLEY: Just one second. 201A for  
13 the front half, and 202 for the back half.

14 MS. CHURNEY: And why was that  
15 methodology required?

16 MR. WILLEY: That's pretty much the  
17 standard methodology achieved out there at this  
18 time. Things do change over time and methods are  
19 always up for revision. That is the standard at  
20 this point in time.

21 MS. CHURNEY: Did Duke provide the  
22 District with any vendor specifications or  
23 guarantees regarding the emission rates for the  
24 specific GE turbines proposed to be used here?

25 MR. WILLEY: No, they did not. We've

1       seen other data from other hearings that have  
2       shown different emission rates -- but we did not  
3       for this case --

4               MS. CHURNEY:   And did Duke provide a  
5       source test results from other GE Frame 7  
6       turbines?

7               MR. WILLEY:   I think we have some source  
8       test results from some of those that they  
9       provided.   I don't have them with me.   I don't  
10      remember where in that process it was.   If it was  
11      either actually before this latest application, so  
12      from the -- probably say no, when we had the  
13      previous application I did receive some data.

14              MS. CHURNEY:   Would you have greater  
15      concern about emission rates for PM10 if source  
16      tests were provided to you indicating those limits  
17      have been exceeded on these turbines in other  
18      locations?

19              MR. WILLEY:   Yes, I would.   And I have,  
20      we have seen data back and forth on some lower and  
21      some higher.   And that's why we have extensive  
22      source testing maintenance in our permit.   Natural  
23      gas fired turbines, we have not source tested  
24      natural gas fired units.   There's not a wealth of  
25      information on the particulate of natural gas

1 fired units. Not like nitrogen oxides and carbon  
2 monoxide, you can fill a room full. There's just  
3 not as much data out there.

4 MS. CHURNEY: Now, I'd like to direct  
5 this to staff generally, not Mr. Willey. Did you  
6 ask, I guess I can direct this to Mr. Badr, did  
7 you ask Duke to provide any vendor guarantees or  
8 specifications for emissions rates for these  
9 turbines?

10 MR. BADR: We had requested something  
11 like that, information on similar turbines on  
12 different projects. And we are familiar with the  
13 vendor of the manufacturer warranties are, and the  
14 limitations are.

15 But on this particular project, no, I  
16 did not, because it's the same turbines.

17 MS. CHURNEY: Did you ask Duke to  
18 provide any source test results from other GE  
19 Frame 7 turbines at other locations?

20 MR. BADR: No.

21 MS. CHURNEY: Okay, Mr. Willey, do you  
22 agree in general that the permit caps on emissions  
23 are only as effective in protecting public health  
24 as the monitoring methods used to enforce them?

25 MR. WILLEY: Yes, I do, but there's more

1 tied in that. Monitoring methods are one way, but  
2 there's also the probability of it going outside  
3 of its monitored value. In other words, some  
4 things will hold steady over time, and some things  
5 tend to be variable. And the particular nature  
6 that I think you're referencing tends to be steady  
7 and not affected by -- parameters, like NOx is  
8 affected by the heat rate.

9 MS. CHURNEY: Well, let me ask you  
10 this. If these caps are regularly exceeded, for  
11 example, there could be greater health impacts  
12 than if they were regularly followed, is that a  
13 fair statement?

14 MR. WILLEY: Yes.

15 MS. CHURNEY: Is it feasible to require  
16 monthly or quarterly source tests either with or  
17 without advanced notice to Duke?

18 MR. WILLEY: It's feasible to require  
19 that. It's very burdensome as far as taking the  
20 units out of operation, firing them at that lower  
21 load.

22 Our conditions that we want to see  
23 testing done at three different load rates, back  
24 to back. That's done to insure that the turbines  
25 will operate consistently.



1           So, you look at one source test of a  
2 turbine on one quarter there's actually nine  
3 different source test runs performed on that  
4 particular unit, and each of those runs takes  
5 approximately a couple of hours.

6           You add them all together, so you're  
7 taking that unit out of service -- specific spot,  
8 so it's pretty burdensome to require the testing  
9 on higher frequency than we have.

10          We did consider quarterly, and then we  
11 started adding up the hours that this thing would  
12 take, be out of service, and the probability of  
13 particulate to be swinging -- swing the  
14 particulates, and it wasn't justified.

15          MS. CHURNEY: If emission limits are not  
16 met on a source test, what are the available  
17 enforcement mechanisms that could be used by the  
18 APCD?

19          MR. WILLEY: Prior to issuing a permit  
20 to operate, we do this, we require the particulate  
21 testing of those different load levels. First and  
22 foremost we wouldn't grant the permit to operate  
23 if they couldn't meet the emission limits  
24 presented in the permit.

25          Secondly, during operation we would

1 issue a notice of violation -- on that, and then  
2 if there was a health impact in terms on that, we  
3 would more than likely -- for an abatement  
4 order -- that abatement order is a process through  
5 our Board.

6 MS. CHURNEY: Do the APCD rules allow  
7 the District to address the air quality goals of  
8 the project? For example, those set forth in the  
9 MOU between the City and Duke? I'm sorry --

10 MR. WILLEY: No.

11 MS. CHURNEY: That's something that only  
12 the CEC can address under CEQA, is that correct?

13 MS. HOLMES: I'm going to object to the  
14 question. He's not testifying about what the CEC  
15 process allows.

16 HEARING OFFICER FAY: Sustained.

17 MS. CHURNEY: The City of Morro Bay has  
18 asked the District in numerous City Council  
19 meetings and other public workshops what the  
20 typical o average PM10 emissions effects will be  
21 as opposed to the extremes, is that correct?

22 MR. WILLEY: Could you repeat that one  
23 more time?

24 MS. CHURNEY: Sure. The City of Morro  
25 Bay has asked the District in many City Council

1 meetings and other public forums what the typical  
2 or average PM10 emissions effects will be for the  
3 project, is that correct?

4 MR. WILLEY: I don't know if they termed  
5 it that particular way. I can probably say  
6 probably.

7 MS. CHURNEY: I guess as compared to  
8 what has been shown to be the modeled maximum.

9 MR. WILLEY: Okay, yes.

10 MS. CHURNEY: Do you recall that in  
11 response at one of those workshops you and Larry  
12 Allen indicated at various times that to get some  
13 feel for that what would be the average typical  
14 PM10 emissions the modeled annual as opposed to  
15 the maximum 24-hour average PM10 emissions from  
16 the new plant would give a good estimate of that  
17 most typical case, do you recall that?

18 MR. WILLEY: Yes, I do.

19 MS. CHURNEY: And is that still your  
20 opinion?

21 MR. WILLEY: An average is a better  
22 representative of a typical, yes.

23 MS. CHURNEY: And do you recall Mr.  
24 Rubenstein's testimony that PM10 emissions are  
25 virtually identical with duct burning and without

1 duct burning based on a per unit of gas burned  
2 comparison?

3 MR. WILLEY: Yes, I do.

4 MS. CHURNEY: Do you believe that is an  
5 appropriate basis for comparison of PM10 emissions  
6 with and without duct firing for air quality  
7 purposes?

8 MR. WILLEY: Could you repeat that one  
9 more time?

10 MS. CHURNEY: Sure. Do you believe that  
11 is the appropriate basis for comparison of PM10  
12 emissions with and without duct firing for air  
13 quality purposes?

14 MS. HOLMES: I'm going to again object  
15 because there's an assumption in the question that  
16 it's appropriate to do the kind of comparison  
17 she's discussing. I think maybe a little bit more  
18 foundation to address that issue. She's asking  
19 Mr. Willey to talk about a comparison that he has  
20 not included in his permit.

21 HEARING OFFICER FAY: Well, I guess I'm  
22 going to overrule the objection. As long as the  
23 witness can understand the question, counsel might  
24 want to rephrase it, but I think it's relevant.

25 MS. CHURNEY: Would you like it

1 rephrased, or do you have it in mind?

2 MR. WILLEY: Yes, if you could rephrase  
3 it, I'm not --

4 MS. CHURNEY: How would you make the  
5 comparison, Mr. Willey?

6 MR. WILLEY: Typically comparing impacts  
7 that would be -- comparing impacts based upon gas  
8 burning, certainly you could -- impacts based on  
9 energy production, which could be another method.

10 MS. CHURNEY: Because duct burning is  
11 less efficient, it uses more gas for the same  
12 amount of electricity generated, is that a true  
13 statement?

14 MR. WILLEY: Than the combined cycle?

15 MS. CHURNEY: Yes.

16 MR. WILLEY: Yes.

17 MS. CHURNEY: And using Mr. Rubenstein's  
18 measure that we just mentioned, it does not  
19 address the fact that fuel efficiency of the  
20 turbines with and without duct burning varies  
21 significantly, is that correct?

22 MR. WILLEY: That's correct.

23 MS. CHURNEY: And from an air quality  
24 standpoint is it more relevant in your view to  
25 compare the total PM10 emissions for producing 168

1 megawatts with duct firing, comparing that with  
2 producing 168 megawatts without duct firing?

3 MR. WILLEY: Yes.

4 MS. CHURNEY: Which results in greater  
5 PM10 emissions for the same electrical output?

6 MR. WILLEY: Duct firing, with duct  
7 firing would produce substantially --

8 MS. CHURNEY: And this question is  
9 directed at staff. Mr. Badr, do you agree with  
10 Mr. Willey's views on the appropriate way to  
11 evaluate the relative PM10 emissions from duct  
12 burning and from baseload?

13 MR. BADR: I don't know what you are  
14 getting to, counsel, but duct firing has been used  
15 throughout the United States, and the reason for  
16 it to be used is supplement firing to increase the  
17 efficiency of the plant. Normally it's been used  
18 during the summer when the air is really hot and  
19 there is a need for extra Btus, so to speak, to  
20 generate the capacity needed or the energy needed  
21 from the power plant.

22 So, it's not used day-in or day-out at  
23 their leisure. Just as you mentioned, it's  
24 expensive to run and they use it very cautiously.

25 MS. CHURNEY: That doesn't really answer

1 my question. But I think I'll just move on.

2 Mr. Willey, once a project like the new  
3 plant is approved is there any ability by the APCD  
4 to require any additional mitigation from Duke if  
5 the new California ambient concentration standards  
6 were to be adopted and the County was not in  
7 compliance?

8 MR. WILLEY: Yes, there are many -- in  
9 place in our planning process and rulemaking to do  
10 that.

11 MS. CHURNEY: Is the mechanism that  
12 you're talking about, it is a change in the rules  
13 regarding emission limitations?

14 MR. WILLEY: Yes, it would be.

15 MS. CHURNEY: And that would be such as  
16 what occurred with respect to the revised APCD  
17 rule 429 provisions regarding NOx?

18 MR. WILLEY: Yes.

19 MS. CHURNEY: And when the District's  
20 rule on PM10 emissions, rule 403, I believe, when  
21 was that last revised?

22 MR. WILLEY: 1976.

23 MS. CHURNEY: And the limitations on  
24 getting local rules revised include budgetary and  
25 prioritization concerns of the APCD, correct?

1 MR. WILLEY: To some extent, yes. But  
2 more to the health -- to recognize health  
3 problems, that's pretty much our goal. And we do  
4 have a PM10 plan on the horizon. It should be  
5 coming out within the next few years.

6 MS. CHURNEY: How long does it typically  
7 take to get a rule revision through the District  
8 process?

9 MS. HOLMES: Again, this is getting  
10 quite far afield from the FDOC, which is what Mr.  
11 Willey's here to testify about.

12 HEARING OFFICER FAY: Can you tie that  
13 in, counsel? What's the relevancy to the FDOC?

14 MS. CHURNEY: Well, I think it goes to  
15 show that if the permit limitations of the FDOC  
16 are found to be not appropriate after we get this  
17 new plant up and running, how long will it take to  
18 do what needs to be done to enact the rules that  
19 will address the pollution concerns. I think it  
20 is relevant.

21 HEARING OFFICER FAY: I think we are  
22 getting a little far afield, and into some  
23 speculative areas. I'm sure you can argue that in  
24 your brief.

25 MS. CHURNEY: Mr. Willey, I have a few



1 questions about the credits that were allowed by  
2 the District generally for the 1995 cessation of  
3 oil operations at the existing plant.

4 First, approximately 51 percent of the  
5 PM credits are in the form of SOx as a precursor  
6 of PM10. Did the District consider requiring an  
7 interpollutant trading ratio in excess of one-to-  
8 one?

9 MR. WILLEY: Yes, we did consider that.

10 MS. CHURNEY: And why was that not done?

11 MR. WILLEY: It wasn't a requirement of  
12 law. And from the understanding of the formation  
13 of particulates, one pound of SO2 will produce  
14 more than one pound of PM10.

15 MS. CHURNEY: I'd like -- at the time  
16 that the credits are retired had you proposed a  
17 two-for-one ratio?

18 MR. WILLEY: Through some talks with  
19 Duke we had agreed that they would retire the  
20 remaining SO2 credits, which would be above a two-  
21 for-one ratio, de facto ratio, and donating the  
22 rest of the credits to -- or retiring the rest of  
23 the credits.

24 MS. CHURNEY: And why was that done?

25 MR. WILLEY: I guess we have the ability

1 to require higher offset ratios and in other  
2 cases. In this case, when we talked to the  
3 applicant they were willing to donate the credits  
4 before we would make any type of requirement for  
5 there to be a higher offset ratio.

6 MS. CHURNEY: And if you could refer to  
7 the final engineering evaluation dated November  
8 20, 2000, that is attached to exhibit 44, which  
9 are Duke's responses to CAPE's data requests as  
10 attachment 2 to the data request response number  
11 86.

12 UNIDENTIFIED SPEAKER: I'm sorry, do you  
13 know what page you're on in exhibit 44?

14 MS. CHURNEY: Well, the engineering  
15 evaluation is only a couple of pages long. And I  
16 just have a question as to whether he participated  
17 in this, the preparation of this document.

18 MR. WILLEY: Yes, I did.

19 MS. CHURNEY: Okay, and it focuses on  
20 oil burning credits, correct?

21 MR. WILLEY: Correct.

22 MS. CHURNEY: If you could focus on  
23 comment three in your response on the bottom of  
24 page two of the report, the commenter, in essence  
25 felt these credits from cessation of oil burning

1       were paper mitigation. And you note in response  
2       to that comment that when the plant used up the  
3       stored fuel oil they did not give up the right to  
4       burn oil in the future, is that correct?

5               MR. WILLEY: That is correct.

6               MS. CHURNEY: And then on top of page 3  
7       you note further that the power plant may legally  
8       burn oil again starting in 2003, do you see that?

9               MR. WILLEY: Yes.

10              MS. CHURNEY: And you then conclude that  
11       since oil was a legal fuel during the time it was  
12       burned, and since the plant has the right to burn  
13       oil in the future, giving up that right generates  
14       a real emission reduction, is that correct?

15              MR. WILLEY: Yes.

16              MS. CHURNEY: Now, if Duke did not have  
17       a right to burn oil in the future, would these  
18       reductions be eligible for banking?

19              MR. WILLEY: No, they would not.

20              MS. CHURNEY: And under comment five on  
21       page three of the report you indicate the use of  
22       fuel oil is prohibited under rule 429 until  
23       December 31, 2002. And that effective January 1,  
24       2003, the fuel oil prohibition is replaced with a  
25       facility-wide NOx emission limit, is that correct?

1 MR. WILLEY: That's correct.

2 MS. CHURNEY: And I believe you've been  
3 asked this question before, but let me ask you on  
4 the record, as of this coming January 1, 2003, is  
5 it feasible that the existing plant can resume oil  
6 burning and still meet the rule 429 NOx emissions  
7 limits?

8 MR. WILLEY: Given the state of the NOx  
9 control on the existing plant, at this point in  
10 time, no.

11 MS. CHURNEY: And, Mr. Willey, for the  
12 benefit of those residents who thought they got  
13 rid of the bad air quality from the burning of the  
14 fuel oil when it was banned in 1995, is it correct  
15 that the emission reduction credits from this  
16 source are, in fact, allowing a significant  
17 portion of the pollutant emissions to go back into  
18 the air again with the new plant, specifically  
19 104.23 tons of PM10?

20 MR. WILLEY: Could you repeat that  
21 again?

22 MS. CHURNEY: Is it correct that the  
23 emission reduction credits from this source are,  
24 in effect, allowing a significant portion of the  
25 pollutant emissions, at least 104.23 tons of PM10,

1 to go back into the air again with the new plant?

2 MR. WILLEY: I wouldn't term it as  
3 significant, as compared to the baseline of the --  
4 usage. It's a fraction of the amount of credits  
5 or the amount of pollution that was from those  
6 stacks, and in fact, it's only a third of the 1995  
7 year, which was an historically high year.

8 But, yes, that oil, a portion of that,  
9 is used as a credit. Now, it could have come from  
10 some other source. We have -- I couldn't say yes,  
11 that's not the -- of this plant, but there's some  
12 very large sources of SO2 in this County -- been  
13 reduced -- credits, regardless of whether or not  
14 it was from the Morro Bay Plant or not.

15 MS. CHURNEY: But the figure that I use  
16 is correct, the 104.23 tons?

17 MR. WILLEY: Seemingly so, yes. If it's  
18 not exactly correct, it's close.

19 MS. CHURNEY: And of this amount 87 tons  
20 will now be in the form of direct PM2.5 whereas in  
21 1995 those 87 tons came from SOx, which is a  
22 precursor of PM10, is that correct?

23 MR. WILLEY: Could you repeat that one  
24 more time?

25 MS. CHURNEY: Sure. Of that 104.23

1 tons, 87 tons will now be in the form of direct  
2 PM2.5 as opposed to SOx?

3 MR. WILLEY: Potentially. Those are  
4 permit limits, so it's a potential. But, yes.

5 MS. CHURNEY: Do PM10 and PM2.5  
6 precursors have a distribution pattern that is the  
7 same as primary PM10?

8 MR. WILLEY: What do you mean by  
9 distribution --

10 MS. CHURNEY: Dispersion.

11 MR. WILLEY: In the modeling that we use  
12 it's the same.

13 MS. CHURNEY: Isn't it generally the  
14 case that secondary particulates form downwind of  
15 the site and can take several hours to form?

16 MR. WILLEY: Yes.

17 MS. CHURNEY: Was the District satisfied  
18 with Duke's modeling for air quality construction  
19 impacts from the project?

20 MR. WILLEY: No, we were not.

21 MS. CHURNEY: What were the concerns of  
22 the District here?

23 MR. WILLEY: I wasn't the person who  
24 actually reviewed that modeling, and I think we  
25 had a couple of interim model runs and we had

1 concerns on each one. The latter had to do with  
2 an effective stack height -- constructing  
3 modeling, equipment.

4 MS. CHURNEY: Do you recall what those  
5 concerns were with respect to the stack height?

6 MR. WILLEY: That they were exceedingly  
7 high stack heights assumed.

8 MS. CHURNEY: Did the District provide  
9 staff with any comments on the PSA that were not  
10 incorporated into the FSA?

11 MS. HOLMES: Is that a question you're  
12 asking staff?

13 MS. CHURNEY: I'm asking the District,  
14 Mr. Willey.

15 MS. HOLMES: I think the in terms of  
16 what's in the FSA the appropriate witness is Mr.  
17 Badr.

18 MS. CHURNEY: No, no, I'm asking whether  
19 staff had any comments on the PSA that they later  
20 found were not incorporated into the FSA -- or the  
21 District, rather.

22 HEARING OFFICER FAY: I think Mr. Willey  
23 can answer that, if he's read the FSA.

24 MR. WILLEY: I do believe there might  
25 have been some comments from Larry Allen of our

1 staff that may not have been incorporated.

2 MS. CHURNEY: Do you know what they  
3 were?

4 MR. WILLEY: They were concerning  
5 construction impacts.

6 MS. CHURNEY: Do you have any concerns,  
7 Mr. Willey, about the number of startups being  
8 requested by Duke for each turbine?

9 MR. WILLEY: I'd generally say, you  
10 know, that the startups are, you know, the hardest  
11 part of trying to get a handle on the transient  
12 nature of the emissions. Make it difficult to  
13 monitor. So, yeah, we are concerned with the  
14 number of startups.

15 I mean ideally the plant would just keep  
16 up and running -- up and running.

17 MS. CHURNEY: Would you have preferred  
18 to see a lower number of permitted startups?

19 MR. WILLEY: Yes.

20 MS. CHURNEY: Did Duke insist on its  
21 proposed number?

22 MR. WILLEY: They didn't insist on  
23 it. -- what they applied for -- project, you have  
24 to evaluate what's being presented in front of  
25 you. And if that meets the requirements and it's



1 determined to be safe, then you have to permit at  
2 that level.

3 MS. CHURNEY: Was there any reduction in  
4 the number they requested in the FDOC?

5 MR. WILLEY: No.

6 MS. CHURNEY: Have you had an  
7 opportunity to review the data on annual PM10  
8 levels in Morro Bay both in terms of arithmetic  
9 and geometric means?

10 MS. HOLMES: Can you just specifically  
11 refer to what information. Is this a data  
12 response?

13 MS. CHURNEY: Yes. It's in Duke exhibit  
14 34, response 26 to CAPE's data request. And it's  
15 on table 6.2-37.

16 MR. WILLEY: Yes, I have that.

17 MS. CHURNEY: And what did you find in  
18 your review?

19 MR. WILLEY: It appears that the -- PM10  
20 arithmetic mean and geometric mean numbers have  
21 been reversed. They don't match ours exactly, so  
22 I'm not sure about where the data comes from.

23 Generally arithmetic mean numbers would  
24 be slightly above our geometric mean numbers, but  
25 they're very consistent in this kind of --

1 generally match that trend that we would expect  
2 to -- geometric mean when they have reported this,  
3 that group.

4 MS. CHURNEY: Thank you. I have no  
5 further questions for Mr. Willey or staff.

6 HEARING OFFICER FAY: Does that conclude  
7 your cross-examination of the staff witnesses?

8 MS. CHURNEY: Yes.

9 HEARING OFFICER FAY: On both air  
10 quality and public health?

11 MS. CHURNEY: Yes.

12 HEARING OFFICER FAY: Okay. And I  
13 believe CAPE was the last party cross-examining  
14 the panel, so, Ms. Holmes, any redirect?

15 MS. HOLMES: Yes, if I could just have a  
16 moment.

17 HEARING OFFICER FAY: Certainly, let's  
18 go off the record for a moment.

19 (Off the record.)

20 HEARING OFFICER FAY: Ms. Holmes.

21 MS. HOLMES: Thank you. I want to turn  
22 first to some redirect questions that actually  
23 arose as a result of some questions in the January  
24 hearings.

25 //

## REDIRECT EXAMINATION

BY MS. HOLMES:

Q First of all, to Mr. Badr, there was a question about whether or not you had considered alternative mitigation for the air quality impacts. And I believe your answer was no.

I'd like you to explain why you didn't think it was appropriate to consider other mitigation.

MR. BADR: When the staff receives the package, the AFC, the application basically, we look for what offsets, what the package with the offsets or the ERCs looks like, where the sources are, what the quantities are. How far are the sources from the existing facility or the proposed facility. The quality of these offsets.

And do all these checks and see if they are quantifiable offsets, if they are enforceable, if they are real, if they are permanent, if they are surplus. These are the criteria basically for any ERCs.

When I received the package from Duke basically we went through the same testing, or the same examination process, and we found that, yes, they meet this five criteria for ERCs, so they

1 have, they met them, so they are good quality  
2 ERCs.

3 And also the location was actually the  
4 best thing in the whole package. It's just from  
5 the proposed facility. So it's contemporaneous  
6 emissions, which CEQA can always hope for.

7 So they are coming from the same  
8 proposed facility by shutting down the existing  
9 one and building the new one. And also they are,  
10 they have very good quality offsets because they  
11 meet all the five criteria of the ERCs.

12 Staff has very little reasons to go out  
13 and examine any other ERCs or even ask for the  
14 applicant to provide any additional ERCs, or even  
15 go out and check for any more ERCs because they  
16 are coming from the same place the project would  
17 be built, and they are meeting all the criteria  
18 they're supposed to be meeting. And they are good  
19 quality ERCs.

20 So I have no reason to go anywhere else  
21 and check for any additional ERCs or quality for  
22 it.

23 MS. HOLMES: Did you consider any  
24 measures that would reduce the actual number of  
25 emissions from the plant such as limiting, for

1 example, duct firing?

2 MR. BADR: Normally we do something like  
3 that when the project will be located in a very  
4 bad PM10 area, for example, or bad emission area,  
5 meaning that the ambient air quality, by itself,  
6 is violating state, federal standards for a number  
7 of years. And the trend is going upward  
8 basically, like it's exceeding like from 95 to 97,  
9 or to 99.

10 The trend is going up for these  
11 emissions, so we go back again and we examine the  
12 project after we know, okay, they provide  
13 excellent ERCs, however because the project or the  
14 proposed project is located in exceedingly  
15 violative ambient air quality, we go back again  
16 and check the project, itself, and see what we can  
17 do.

18 Is there part of this components can be  
19 eliminated basically to reduce the impact or  
20 reduce the PM10, and therefore reduce the impact.  
21 Or any other emission, doesn't have to be PM10.  
22 I'm using PM10 as an example here.

23 So in this case, no, we did not do that  
24 simply because the existing air quality is fine;  
25 and there is no violations of PM10, for example,

1 here except one time for the state standard, which  
2 is much lower than the federal standard, for the  
3 last seven years.

4 So I have very little reason to go out  
5 and check back again the design of the project and  
6 try to reduce or propose different turbine maybe  
7 or no duct burner, or eliminate the duct burner or  
8 any of that, because I have no reason to.

9 MS. HOLMES: Okay, thank you. Also,  
10 during the January hearings there were a series of  
11 questions about whether or not the mitigation that  
12 was being provided was regional in nature. And  
13 your answer, referring back to the transcript, was  
14 that it was.

15 Is it your testimony that the PM10, that  
16 the project is going to have regional PM10  
17 impacts, as well?

18 MR. BADR: The project will have  
19 regional impacts and regional benefit from  
20 providing the ERCs from the same location. So it  
21 has actually both local and regional impacts.

22 But PM10 in general is a regional  
23 impact.

24 MS. HOLMES: Thank you. Mr. Willey, I  
25 was wondering if you could talk about whether or

1 not that's the District's perspective, as well.

2 Do you see the PM10 problem as a regional problem?

3 MR. WILLEY: Yes, we do, and we look at  
4 the PM10 levels throughout the County. If the  
5 PM10 levels are higher in Morro Bay, they're also  
6 higher in Paso Robles and in San Luis Obispo, in  
7 the south County, as well.

8 And you can look through our trend  
9 analysis and just see from year to year it varies  
10 from city to city. In a particular year one might  
11 be higher than the other, as these pockets of air  
12 pollution move around. But, generally it is a  
13 regional nature.

14 So, if Morro Bay has a higher year and  
15 then San Luis Obispo has a higher year than last  
16 year, and Atascadero has a higher year than last  
17 year.

18 MS. HOLMES: Thank you. Mr. Badr, a  
19 question was put to you earlier this morning about  
20 Duke's assertions with respect to project impacts.

21 You answered in response to a question  
22 from Ms. Churney that the new project impacts  
23 would be higher. When you answered that question  
24 were you referring to the modeling results that  
25 were provided by both SAIC and by the applicant?

1 MR. BADR: I'm not so sure really which  
2 question you're talking about. We were talking  
3 about 3.1-17?

4 MS. HOLMES: Yes.

5 MR. BADR: And I believe that the  
6 question was comparing the new and the old? Yes,  
7 the new facility impact would be higher than the  
8 existing facility.

9 MS. HOLMES: And you're basing that on  
10 the modeling results that were --

11 MR. BADR: On the modeling results, and  
12 also the modeling results you have to understand  
13 that the existing facility is burning natural gas,  
14 and modeled as such. Although it has the right to  
15 burn oil, and perhaps that would be a little  
16 different if that was demonstrated.

17 MS. HOLMES: Thank you. There were also  
18 some questions this morning with respect to  
19 whether or not you had changed any of the  
20 conditions that were in the FDOC.

21 I'd like to address a question to Mr.  
22 Willey. Did staff provide comments to the  
23 District on the PDOC? And if they did, were any  
24 of the proposed conditions in the PDOC changed as  
25 a result?



1           MR. WILLEY: CEC Staff provided ten  
2       comments, and, yes, we did change some conditions  
3       based upon those comments.

4           MS. HOLMES: Thank you. Earlier this  
5       morning Ms. Churney walked you, Mr. Willey,  
6       through a scenario of the last day of the existing  
7       plant operating on day one and the first day of  
8       the new plant operating at maximum capacity on day  
9       two.

10          Do you recollect that discussion?

11          MR. WILLEY: Yes, I do.

12          MS. HOLMES: And my understanding of  
13       your answer was that the modeling that had been  
14       done for the project indicated that there would be  
15       an increase on day two, was that correct?

16          MR. WILLEY: That's correct.

17          MS. HOLMES: And if you refer back to  
18       the modeling, does the modeling show, in fact,  
19       that there is an increase -- would be an increase  
20       every single day of a given year and at every  
21       single location?

22          MR. WILLEY: No, it would not.

23          MS. HOLMES: And was it your testimony  
24       that this was a change that could be measured  
25       through the District's approved ambient air

1 quality monitoring?

2 MR. WILLEY: Yeah, I testified that we  
3 could not really pick this up.

4 MS. HOLMES: I'd like to turn briefly to  
5 a discussion about the feasibility of the PM10  
6 limits that the applicant has proposed.

7 There's been a number of questions  
8 asked, and answers provided about whether or not  
9 those limits are feasible, and whether it's an  
10 appropriate limit to include in a permit  
11 condition.

12 I'd like to ask you why you thought that  
13 it is a reasonable requirement to put these  
14 relatively low limits in the District's permit.

15 MR. WILLEY: First off, whenever an  
16 applicant proposes a lower emission rate than --  
17 or one of the lower emission rates, as compared to  
18 others that may be higher, we would want to try to  
19 get the lowest possible emission rate.

20 First, we want to make sure that it's  
21 feasible. And we have seen a lot of source tests  
22 that have shown that it could be higher and it  
23 could be lower and it could be near there.

24 So it appeared to be feasible to us.  
25 And an important fact of the last test is is it

1 measurable. And with the source testing that we'd  
2 proposed, we feel it is measurable.

3 So when we looked at that it really was  
4 a win/win situation for us, that if we could get  
5 the lower emission limit and it's measurable, then  
6 we should put it on the permit.

7 MS. HOLMES: The testing that's required  
8 in your condition 22, is that testing that you  
9 would typically require for a gas-fired project?

10 MR. WILLEY: I assume you're referring  
11 to the PM10, and no, we have never really required  
12 particulate source testing for gas-fire projects.  
13 And that's part of the reason why there's not a  
14 lot of data out there for natural gas fired  
15 particulate testing. We run into the situation  
16 where we have conflicting data. There's just not  
17 a large volume of information out there like there  
18 are on other pollutants.

19 MS. HOLMES: Is the fact that the  
20 testing is required for three different load  
21 levels reduce the ability of the project owner to  
22 in any way manipulate the tests to achieve certain  
23 results?

24 MR. WILLEY: Yes, that's the intent of  
25 the three different load levels, to keep it up to

1 make sure that the unit is operating consistently,  
2 so it's not tuned at a particular load level to be  
3 any more efficient.

4 MS. HOLMES: Thank you. There was a  
5 question early this morning about the number of  
6 startups to which I believe you responded that,  
7 something along the lines that you wished there  
8 were fewer startups. Do you recollect that?

9 MR. WILLEY: Yes, I do.

10 MS. HOLMES: And were there emission  
11 reduction credits provided to cover the amount of  
12 startups that are permitted in the District's  
13 FDOC?

14 MR. WILLEY: Yes. As I testified  
15 earlier they met all the requirements, and one of  
16 that was offsetting those reductions and the  
17 modeled impacts, as well, were also modeled to be  
18 less than significant.

19 MS. HOLMES: Thank you. And finally,  
20 with respect to the oil-burning ERCs that there  
21 were questions about earlier this morning, if Duke  
22 were to install NOx control on the facility, could  
23 it burn oil under the District's regulations once  
24 the current limitation expires?

25 MR. WILLEY: Yes.

1 MS. HOLMES: Thank you. Those are all  
2 my redirect questions.

3 HEARING OFFICER FAY: Okay. Any  
4 recross, Mr. Harris?

5 MR. HARRIS: Yeah, briefly.

6 RECROSS-EXAMINATION

7 BY MR. HARRIS:

8 Q Mr. Willey, I want to ask you a couple  
9 questions about the Air District's process, and  
10 we've heard some discussion about the oil-burning  
11 credits. But I want to talk about all credits, in  
12 general.

13 Is there an application that people go  
14 through to bank credits?

15 MR. WILLEY: Yes, there is an  
16 application process.

17 MR. HARRIS: And does that application  
18 process include a notice of a proposed decision?

19 MR. WILLEY: Correct.

20 MR. HARRIS: And does that notice of  
21 proposed decision include a comment period for the  
22 general public to comment on those proposed  
23 banking?

24 MR. WILLEY: Yes, it does.

25 MR. HARRIS: Those comments then are

1 incorporated into or considered as part of a final  
2 decision, is that correct?

3 MR. WILLEY: Correct.

4 MR. HARRIS: And that final decision  
5 from the District is then also appealable to your  
6 hearing board, is that correct?

7 MR. WILLEY: Yes.

8 MR. HARRIS: So if there's an objection  
9 to any credits that are banked at the District,  
10 there's a public process for the public to weigh  
11 in on the banking of those credits, is that  
12 correct?

13 MR. WILLEY: Yes, that's correct for  
14 any; they can appeal any credit process. But the  
15 public notice has to do with any credits that are  
16 worth more than 100 pounds per day.

17 And I'd also like to add that EPA and  
18 ARB are also involved in this, and comment, as  
19 well.

20 MR. HARRIS: So in terms of time to  
21 object to those credits being banked, the proper  
22 time is during the Air District's banking process,  
23 is that correct?

24 MR. WILLEY: Correct.

25 MR. HARRIS: I have no other questions.

1 HEARING OFFICER FAY: Okay. Does the  
2 City have any questions? No. All right. CAPE,  
3 any recross?

4 MS. CHURNEY: Yes, just one question,  
5 please, for Mr. Willey.

6 RECROSS-EXAMINATION

7 BY MS. CHURNEY:

8 Q You mentioned that you wished that there  
9 would be fewer startups, but ERCs were provided.  
10 But nonetheless you wish that there would be fewer  
11 startups. Why do you wish that there would be  
12 fewer startups?

13 MR. WILLEY: When you start up a turbine  
14 from a cold start, or even a warm state, the  
15 emissions of certain pollutants are less  
16 controlled at that point.

17 MS. CHURNEY: Thank you.

18 HEARING OFFICER FAY: Anything further,  
19 Ms. Churney?

20 Ms. Churney, anything further?

21 MS. CHURNEY: I'm sorry, no, thank you.

22 HEARING OFFICER FAY: Okay, fine. Ms.  
23 Holmes.

24 MS. HOLMES: Just one last question,  
25 please.

## 1 FURTHER REDIRECT EXAMINATION

2 BY MS. HOLMES:

3 Q In establishing what the potential  
4 project emissions are, does the District take into  
5 account the fact that the emission control systems  
6 are more volatile, or emissions can be less  
7 controlled during startup when it establishes the  
8 emission limits and the ERC requirements?

9 MR. WILLEY: Correct. That's all taken  
10 into account. It's fully modeled and evaluated.  
11 So if there was -- there's not a mechanism for you  
12 to limit startups when they meet all the  
13 requirements that they did.

14 MS. HOLMES: Okay.

15 HEARING OFFICER FAY: I think that  
16 concludes our examination of the staff panel on  
17 their testimony on air quality and public health.

18 And as we discussed earlier, we'd like  
19 to give staff the opportunity to present Mr.  
20 Willey's testimony regarding how the final  
21 determination of compliance could have an impact  
22 on water use.

23 Go ahead, Ms. Holmes.

24 MS. HOLMES: Thank you.

25 //



1 DIRECT EXAMINATION

2 BY MS. HOLMES:

3 Q Mr. Willey, on page 11 of Duke's  
4 testimony on group three topics, it probably has  
5 an exhibit number, but I know it has not been  
6 formally identified, and certainly not been  
7 entered into evidence at this point --

8 MS. HOLMES: Do you want to stop and do  
9 that at this point, Mr. Fay? Identify it for the  
10 record or --

11 HEARING OFFICER FAY: Yes. Mr. Harris,  
12 can you help us out? Which, I'm sure it was on  
13 the list you provided, what the exhibit number is?  
14 We'll mark that at this time.

15 Let's go off the record.

16 (Off the record.)

17 HEARING OFFICER FAY: And, Mr. Harris,  
18 with your indulgence we will mark for exhibit the  
19 applicant's soil and water resources testimony,  
20 lead witness Robert C. Mason, as the next exhibit  
21 in order. That's exhibit 177 marked for  
22 identification.

23 Go ahead, Ms. Holmes.

24 MS. HOLMES: Thank you.

25 //

1 BY MS. HOLMES:

2 Q Mr. Willey, on page 11 of what has just  
3 been identified as exhibit 177, Duke provides the  
4 following statement. And I'll just read it to  
5 you: Per regulatory limitations expressed in air  
6 permits, the new combined cycle units will not  
7 operate in maximum peak load mode for more than  
8 4000 hours per year.

9 I'd like you to provide a little bit of  
10 clarification to the Committee on how the air  
11 permit conditions affect the project's operation  
12 and instead of calling it maximum peak load mode,  
13 I think I'll just simply refer to the use of duct  
14 firing. I think it's simpler.

15 Are there limitations contained in  
16 condition 23 on the heat input rates?

17 MR. WILLEY: Yes, there are limitations  
18 on heat input rates.

19 MS. HOLMES: And can you explain how  
20 those affect the project's ability to operate in  
21 duct firing?

22 MR. WILLEY: Yes. The heat input rates  
23 limits were based upon scenarios at different  
24 atmospheric conditions that the duct burners would  
25 operate for 16 hours in a day on a daily basis,

1 and eight hours without duct firing at maximum  
2 load.

3 They do not limit the amount of hours of  
4 duct firing and if atmospheric conditions were  
5 correct duct firing could be done throughout the  
6 day.

7 MS. HOLMES: Is that a feasible scenario  
8 that the atmospheric conditions would be different  
9 such that duct firing could occur for more than 16  
10 hours a day?

11 MR. WILLEY: I believe so, yes.

12 MS. HOLMES: And you believe that there  
13 could be atmospheric conditions that could allow  
14 duct firing to continue for 24 hours a day under  
15 this condition?

16 MR. WILLEY: Yes, it's possible.

17 MS. HOLMES: Thank you. Similarly, I  
18 believe there's also plants that are placed on the  
19 project's operation by virtue of mass emission  
20 rates. I believe those are found in conditions 25  
21 and 29, and then there's also some startup  
22 conditions that make things confusing for some of  
23 us, as well.

24 But, basically do those conditions  
25 establish mass emission caps, if you will, on an

1 hourly, daily, quarterly and annual basis?

2 MR. WILLEY: Yes.

3 MS. HOLMES: And do they prohibit or  
4 prevent the project from operating more than 4000  
5 hours a year in duct firing mode?

6 MR. WILLEY: No.

7 MS. HOLMES: Are the mass emission caps  
8 that are contained in those conditions based on  
9 the potential to emit numbers that are found  
10 earlier in the permit?

11 MR. WILLEY: Yes.

12 MS. HOLMES: And based on your  
13 experience do you expect that the source testing  
14 that will be done for the project will result in  
15 emission rates that are similar to, higher than,  
16 or lower than the PTE numbers that were used in  
17 the permit?

18 MR. WILLEY: Generally speaking, lower.

19 MS. HOLMES: Thank you. Those are the  
20 questions that I have.

21 HEARING OFFICER FAY: Okay. Any cross-  
22 examination from applicant?

23 MR. ELLISON: Thank you.

24 //

25 //

## CROSS-EXAMINATION

BY MR. ELLISON:

Q Mr. Willey, my name is Chris Ellison, and I'm doing the soil and water portion of this testimony, so I'm going to ask you just a couple of questions.

And for the purpose of these questions I don't want to address the operation of the plant on a daily basis, but rather on an annual basis. Do you have that assumption in mind?

A Yes.

Q Okay. Assuming the atmospheric conditions appropriate to an annual analysis, and assuming that the turbines are operated in a baseload manner, and assuming that when the plant is duct fired that it's duct fired at full capacity, would it be possible for the plant to operate year-round, 24 hours a day, 365 days a year with duct firing that entire time, and meet the mass emissions limitations of your permit?

MS. HOLMES: Can I -- I'm sorry, can I just ask one clarifying question. Are you asking him to assume annual atmospheric conditions, is that what you're --

MR. ELLISON: One of the assumptions was

1 atmospheric conditions appropriate to an annual  
2 analysis, yes.

3 MS. HOLMES: Sorry to interrupt.

4 MR. WILLEY: No, it could not operate 24  
5 hours a day duct firing, 365 days a year under  
6 those assumptions.

7 BY MR. ELLISON:

8 Q Okay. Using those same assumptions do  
9 you have any estimate as to the maximum number of  
10 hours of duct firing that as a practical matter  
11 the plant could operate at and meet those  
12 requirements?

13 A Other than the applicant's 4000 hours, I  
14 haven't done the analysis to determine what the  
15 probability of being able to operate on a higher  
16 level than that, so I don't have that number.

17 Q Do you have any basis to question or  
18 disagree with the 4000 hour estimate?

19 A No.

20 MR. ELLISON: That's all I have, thank  
21 you.

22 HEARING OFFICER FAY: Okay. Does the  
23 City have any questions?

24 MR. SCHULTZ: No questions.

25 HEARING OFFICER FAY: No questions.

1 CAPE?

2 MS. CHURNEY: No questions.

3 MS. HOLMES: Can I ask one more  
4 question?

5 HEARING OFFICER FAY: Yes.

6 REDIRECT EXAMINATION

7 BY MS. HOLMES:

8 Q Mr. Willey, do you have any reason to  
9 believe that the 4000-hour number is particularly  
10 appropriate or reasonable?

11 A No, I don't.

12 MS. HOLMES: Thank you.

13 MR. ELLISON: So if I could just follow  
14 up?

15 (Laughter.)

16 MR. ELLISON: Just to make this record  
17 perfectly clear.

18 RECROSS-EXAMINATION

19 BY MR. ELLISON:

20 Q Mr. Willey, you don't know whether the  
21 4000-hour number is correct or incorrect, is that  
22 your testimony?

23 A My testimony is that it can be 4000 or  
24 more, should definitely be 4000 or greater, not  
25 4000 or less.

1           Q     But you have also testified that it's  
2     not -- there are 8760 hours in a year, correct?

3           A     Last time I checked.

4           Q     Okay.

5                     (Laughter.)

6     BY MR. ELLISON:

7           Q     In most years except for leap years.  
8     And you had testified that the number is certainly  
9     less than that, correct?

10          A     Correct.

11          Q     So there is some maximum amount of duct  
12     firing that is below 8760, in your opinion at or  
13     above 4000, but you don't know what that number  
14     is?

15          A     There would be a lot of assumptions, the  
16     particular weather patterns for the year, a lot of  
17     different things would have to go into that, and I  
18     have not done that analysis.

19          Q     Okay.

20                 MR. ELLISON:  If I may, in response to  
21     this testimony, we would also like to offer Mr  
22     Rubenstein on this point briefly.  So at the  
23     appropriate time we will do that.  It could be  
24     now, if you wish.

25                 HEARING OFFICER FAY:  I think we should



1 do it now since it's before us at this time. Have  
2 you concluded, Ms. Holmes?

3 MS. HOLMES: Yes.

4 HEARING OFFICER FAY: No further  
5 questions? All right.

6 Go ahead, Mr. Ellison.

7 DIRECT EXAMINATION

8 BY MR. ELLISON:

9 Q Mr. Rubenstein, you just heard the  
10 examination of Mr. Willey on this subject. Let me  
11 give you the same assumptions that I gave to Mr.  
12 Willey, which are an annual analysis, the  
13 atmospheric conditions appropriate to an annual  
14 analysis, turbine operation in baseload mode, and  
15 duct firing at full capacity.

16 Have you done any calculation of the  
17 maximum number of hours of duct firing using those  
18 assumptions that the plant could operate at within  
19 the limitations of the permit?

20 A Yes, I have.

21 Q And what is that number?

22 A That number is 4000 hours per year.

23 That was the basis for the emissions calculations  
24 that we presented to the Air District and to the  
25 Commission.

1 MR. ELLISON: That's all I have, thank  
2 you.

3 HEARING OFFICER FAY: Ms. Holmes?

4 MS. HOLMES: No, no questions.

5 HEARING OFFICER FAY: City? CAPE?

6 MS. CHURNEY: No questions.

7 EXAMINATION

8 HEARING OFFICER FAY: Mr. Rubenstein,  
9 could you summarize for the Committee the basis  
10 for reaching that figure?

11 MR. RUBENSTEIN: That figure was not  
12 back calculated. When this project was first  
13 being designed, we had asked Duke what kind of an  
14 operating profile, if you will, they wanted for  
15 the plant, what types of flexibility they would  
16 prefer, because different project developers have  
17 different needs.

18 And one of the requests that we got from  
19 Duke is that we perform all of our emissions  
20 calculations and air analyses based on the  
21 assumption that there would be up to 4000 hours  
22 per year of full load duct firing, in addition to  
23 baseload operation of the plant for 8400 hours per  
24 year.

25 Consequently that assumption was built

1       into all of our calculations. And those  
2       calculations resulted in ultimately the emission  
3       limits that the Air District has imposed on the  
4       project.

5               Those assumptions are also reflected in  
6       the heat input limits that Mr. Willey referred to  
7       earlier as condition 23 of the final determination  
8       of compliance.

9               HEARING OFFICER FAY: But is it correct  
10      that those assumptions and the FDOC do not  
11      necessarily limit the project to 4000 hours?

12              MR. RUBENSTEIN: That's correct.

13              HEARING OFFICER FAY: And do you have an  
14      opinion of what the practical or feasible  
15      limitation of hours would be of maximum duct  
16      firing hours?

17              MR. RUBENSTEIN: Are you asking the  
18      question in the narrow context of compliance with  
19      the permit limit?

20              HEARING OFFICER FAY: Yes, and still  
21      comply with the permit limit.

22              MR. RUBENSTEIN: The reason I asked for  
23      that clarification is that I have no knowledge of  
24      what other factors related to water or other  
25      issues might affect that number.

1 But as long as the plant's emissions and  
2 heat input limits are met, that number could be  
3 higher than 4000 hours per year. I doubt, as a  
4 practical matter, that it could be higher than  
5 4000 hours of full load duct firing, meaning 4000  
6 hours at 426 million Btus per hour.

7 It could be a higher number of hours  
8 with a lower average heat input, meaning there's  
9 less duct firing and less steam generated as a  
10 result. And there's a very wide range, I don't  
11 know what the outside number could be.

12 HEARING OFFICER FAY: And when you say  
13 unlikely to exceed 4000 hours of duct firing, is  
14 that because of the mass emissions limitations  
15 that it would encounter?

16 MR. RUBENSTEIN: The fuel use  
17 limitations and the mass emission limitations are,  
18 with the exception of NOx and CO, essentially  
19 matched. And so if you exceed one, you will  
20 exceed the other for the other pollutants.

21 And, yes, if you were to fire at duct  
22 fire for 4000 hours per year at a maximum rated  
23 input for those duct burners, in combination with  
24 baseload operation of the plant for the rest of  
25 the year you would exceed the fuel use limit and

1 the mass emission limits for several pollutants.

2 HEARING OFFICER FAY: All right.

3 MS. HOLMES: Mr. Hearing Officer, could  
4 I ask one follow up question on --

5 HEARING OFFICER FAY: Sure.

6 CROSS-EXAMINATION

7 BY MS. HOLMES:

8 Q If the plant were to have fewer startups  
9 per year and/or not to be operating in baseload  
10 the other 4000 hours per year, doesn't that  
11 provide more flexibility for additional duct  
12 firing and still allowing you to meet the permit  
13 limitations in the FDOC?

14 A I have to answer that question in two  
15 parts because the answers are different.

16 With respect to fewer startups and  
17 shutdowns, no, that would not affect my  
18 conclusion. And the reason is that the worst case  
19 for the pollutants that are going to be  
20 controlling here, which would be sulfur dioxide  
21 and particulate matter, are unaffected by startups  
22 and shutdowns. The worst case would, in fact, be  
23 baseload operation year-round.

24 So, decreasing the number of startups  
25 and shutdowns would not provide more flexibility.

1           The second part of your question asked  
2       for fewer hours of baseload operation. And in  
3       theory that would certainly be true, although it's  
4       hard to hypothesize a case where market demands  
5       for power would be such that a turbine is not  
6       operated at baseload year-round, and yet there's a  
7       higher demand than 4000 hours per year for peaking  
8       operation.

9           Whether that's possible or not goes  
10      beyond --

11          Q     Right, I'm just asking about the permit  
12      limits, I'm not asking you to speculate about  
13      market conditions. And I think you've given the  
14      answer is that yes, if there were fewer hours of  
15      baseload operation, there could be more hours of  
16      duct --

17          A     Duct firing, right.

18                HEARING OFFICER FAY: I realize in the  
19      concept of things, shifting to Mr. Willey's  
20      testimony about limitations that might affect  
21      water intake, I'm a bit out of order, but, Mr.  
22      Willey, I just wanted to call your attention to  
23      the request for subpoena that CAPE submitted.

24                Can you get that before you, or are you  
25      familiar with that?

1 MR. WILLEY: I've read it, but it's been  
2 a few days.

3 HEARING OFFICER FAY: Okay, why don't  
4 you take a moment and get that in front of you.

5 (Pause.)

6 MS. HOLMES: Mr. Hearing Officer, are  
7 you specifically referring to the declaration of  
8 Bonita Churney that was --

9 HEARING OFFICER FAY: Yes, --

10 MS. HOLMES: -- docketed on --

11 HEARING OFFICER FAY: -- on page 4 --

12 MS. HOLMES: -- February 25th?

13 HEARING OFFICER FAY: -- paragraph 3,  
14 numbered paragraph 3 on page 4, declaration of  
15 Bonita Churney re --

16 MS. HOLMES: Okay, I have a number of --  
17 well, I have the declaration beginning on page 3.  
18 I'm not sure we're looking at the same --

19 HEARING OFFICER FAY: Okay, paragraph 3  
20 is the one I'm interested in, numbered paragraph  
21 3 -- Mr. Rubenstein's testimony.

22 Are you familiar with that, Mr. Willey?

23 MR. WILLEY: Yes, I am.

24 HEARING OFFICER FAY: Now, do you have,  
25 representing the District, do you share any of the

1 concerns that are alleged to be voiced by Dr. Fox  
2 through Ms. Churney's declaration?

3 And presumably had she been available to  
4 offer rebuttal she would have raised these  
5 matters.

6 The Committee would like to know if, as  
7 a representative of the Air District, you have  
8 comments on any of these challenges?

9 MR. WILLEY: Obviously there are some  
10 concerns, and that's why we have permit conditions  
11 that cover these areas. Kind of unique permit  
12 conditions in the fact that, you know, we are  
13 requiring 201 and 202 measurement methods for the  
14 particulates, and not at this point the method 8  
15 on the back half is not allowable.

16 That's not to say in the future that it  
17 might be proven to be acceptable, but at this  
18 point it's not. And so we did have some concerns  
19 with that.

20 In addition, the acrolein --

21 HEARING OFFICER FAY: How did you  
22 resolve those concerns?

23 MR. WILLEY: How did we resolve the  
24 concerns? Well, we have not allowed the method  
25 to, method 8 to be used at this point. So that's



1       how we resolved that concern.

2               We haven't crossed it out for future in  
3       case it's been approved by EPA and the Air  
4       Resources Board. But at this point we wouldn't  
5       allow it.

6               And in regards to the acrolein  
7       emissions, acrolein is a very sticky substance to  
8       get ahold of. The data out there is not real good  
9       on it. And it's very hard to measure and handle  
10      in the lab, and in the field to the lab.

11              What we have done is required  
12      significant source testing, and then a  
13      reevaluation of the toxic impacts on that. And,  
14      again, I haven't seen that in anybody else's air  
15      quality permit. It's kind of unique to this one.

16              HEARING OFFICER FAY: The requirement  
17      that you placed on the applicant you believe is  
18      unique to this --

19              MR. WILLEY: I haven't seen it as far as  
20      reevaluating the toxic impacts during basically  
21      the construction portion of it before the plant is  
22      operational. So that's something that I haven't  
23      seen before. But we went the extra step to do  
24      that because we share these concerns, as well.

25              HEARING OFFICER FAY: And does your

1 permit require specific testing methods for  
2 acrolein to try to address its elusive qualities?

3 MR. WILLEY: At this moment I'm not  
4 familiar with the acrolein test methods, but we  
5 would require it to be an acceptable method. And  
6 we do have some people on staff that are aware of  
7 the problems of acrolein.

8 HEARING OFFICER FAY: So at the very  
9 least it would a test method acceptable to  
10 California Air Resources Board?

11 MR. WILLEY: Air Resources Board,  
12 correct.

13 HEARING OFFICER FAY: Okay.

14 MR. WILLEY: That's correct.

15 HEARING OFFICER FAY: Okay, thank you.

16 Any other comments on the critiques in  
17 paragraph three from your perspective that you'd  
18 like to bring to the Committee's attention?

19 (Pause.)

20 MR. WILLEY: I might also point out that  
21 on the acrolein we do have the oxidation catalyst  
22 that will be controlling that. It starts up, it  
23 will be a little less control on startup. And  
24 then as the catalyst gets hot it will pretty much  
25 oxidize, I'd estimate probably 90 percent or

1 greater, the acrolein as it gets up to  
2 temperature.

3 And I'd also like to point out that  
4 acrolein is not a carcinogenic impact, not a long-  
5 term impact. It's impact is eye irritation, mild  
6 eye irritation, I believe is the correct term on  
7 that.

8 HEARING OFFICER FAY: You mean the  
9 thresholds, the significant thresholds are based  
10 on eye irritation?

11 MR. WILLEY: Correct. It's not a  
12 chronic or a carcinogenic impact. It's an acute,  
13 short-term impact, it would be eye irritation.

14 HEARING OFFICER FAY: Okay. Thank you  
15 very much.

16 All right, I believe that concludes our  
17 testimony on air quality and public health for the  
18 staff. And our exhaustive taking advantage of Mr.  
19 Willey. Thank you very much.

20 And now we move back to CAPE's  
21 presentation of its direct air quality testimony.

22 Ms. Churney.

23 MS. CHURNEY: Yes, I'd like to call  
24 Pamela Soderbeck as a witness, please.

25 HEARING OFFICER FAY: Ms. Soderbeck,

1 have you been previously sworn?

2 MS. SODERBECK: Yes, I have.

3 HEARING OFFICER FAY: Okay. You remain  
4 under oath, then.

5 DIRECT EXAMINATION

6 BY MS. CHURNEY:

7 Q And referring to your declaration, Ms.  
8 Soderbeck, which is a part of exhibit 139, do you  
9 have any changes, corrections or modifications to  
10 make to your prefiled testimony?

11 A Yes, I have a few. Page 2, paragraph 5,  
12 reference midway down that paragraph -- I've been  
13 busier, so the reference to 600 studies is now  
14 700.

15 The page 3 on paragraph 9, the second  
16 sentence that says: To my knowledge the  
17 appropriate high data figures have not been  
18 provided by Duke in any publicly available  
19 information." That can be clarified in the light  
20 of the last hearing when Mr. Rubenstein did  
21 provide those figures.

22 MS. HOLMES: I'm sorry, what page are  
23 you on?

24 MS. SODERBECK: I'm on page 3, second  
25 sentence of paragraph 9.

1 MS. HOLMES: Thank you.

2 MS. SODERBECK: I guess the next one is  
3 on paragraph 10, the last sentence. Again, it's a  
4 clarification. Where I say: that although the  
5 APCD requested and received the model construction  
6 concentrations information none of its rules and  
7 regulations directly govern reaching resulting  
8 concentrations as opposed to emissions." Which  
9 was confirmed to me by Gary Willey.

10 I just want to clarify that what I'm  
11 talking about there is that the APCD does require  
12 and looks at anything above the state standard as  
13 to concentrations, but doesn't go below those  
14 standards in terms of analyzing impacts of  
15 concentrations.

16 Paragraph 12, the sentence which carries  
17 over on page 4 to the top of page 5, I would just  
18 add at the end of that, because of the terminology  
19 that's been going back and forth on various  
20 parties as to what conservative means, I wanted to  
21 be really clear. When I say it's extremely  
22 conservative approach in light of Duke's earlier  
23 protest, but it's quite liberal when attempting to  
24 determine the full scope of the resulting  
25 significant adverse health effects. I would add:

1 and would significantly underestimate the actual  
2 risks."

3 And finally on page 8 in paragraph 19,  
4 let me do the easier correction first. In  
5 paragraph B, second sentence, which was the fourth  
6 line, there's a reference in parentheses to .1  
7 percent. That should not be .1, it's just 1  
8 percent.

9 And lastly, in paragraph A, I reference  
10 the cancer risk is considered significant if it's  
11 greater than 10 in one million. Just to be clear,  
12 what I'm talking about here is there are sort of  
13 two significant risk levels that usually go in the  
14 public health discussions. The one in a million  
15 relates to when it's significant enough you have  
16 to utilize BACT.

17 And once it's 10 in a million you really  
18 can't proceed. And that's the figure that I'm  
19 referring to here. And it's also the same  
20 reference in the reports. And I can print out  
21 those pages later when I get to summarizing the  
22 reports.

23 BY MS. CHURNEY:

24 Q And are those all the corrections that  
25 you have?

1           A     Yes.

2           Q     And with those corrections are the facts  
3     stated in your --

4           MR. HARRIS:  Excuse me, I'm not sure.  
5     I'm sorry, Bonita -- Jeff Harris.  I'm not sure I  
6     understood that last correction about the one in  
7     10 million.  Can you go through that again?  Does  
8     your language change there, or are you just --

9           MS. SODERBECK:  I'm just explaining what  
10    the -- my reference to the 10 in one million is,  
11    is really to the reference that presumes you've  
12    already put BACT and can't go forward, as opposed  
13    to the one in a million risk that would require  
14    you to use BACT.

15          MR. HARRIS:  You haven't changed the  
16    text of that --

17          MS. SODERBECK:  No, just a clarification  
18    as to what the number is.

19          MR. HARRIS:  Thank you very much,  
20    appreciate it.

21    BY MS. CHURNEY:

22          Q     Okay, and with those corrections and  
23    clarifications are the facts stated in your  
24    declaration true and correct?

25          A     Yes, they are.

1 Q And was that declaration prepared by  
2 you?

3 A Yes, it was.

4 Q And are the opinions your own?

5 A Yes.

6 Q And do you adopt the testimony in your  
7 declaration as your testimony?

8 A Yes.

9 Q Okay.

10 MS. CHURNEY: With that I would offer  
11 that portion of exhibit 139 into the record at  
12 this point.

13 HEARING OFFICER FAY: Is there  
14 objection? That is received into evidence at this  
15 point.

16 BY MS. CHURNEY:

17 Q Ms. Soderbeck, could you please  
18 summarize briefly your educational and  
19 professional background?

20 A Yes. I graduated from San Diego State  
21 with a BA in history and minors in economics and  
22 accounting. And I then graduated from Harvard Law  
23 School cum laude in '78, 1978.

24 Q And how did you come to gain your  
25 expertise on the health impacts of PM10 and PM2.5?



1           A     I guess I should back up a little bit,  
2     I'm not sure I quite finished your prior question.  
3     As to professional experience I did practice law  
4     until 1995, and worked primarily in the areas of  
5     corporate and securities and merger and  
6     acquisitions.

7                     I stopped practicing in '95 and became  
8     an inactive Bar member. And I began doing work,  
9     research work on Alzheimer's Disease. Working  
10    with Dr. Jeff Cummings, who's the head of the  
11    UCLA, I'm not sure exactly what the title is, but  
12    it's their Alzheimers Research Center. And he  
13    also works at the VA Hospital down there, and is  
14    very renowned in that particular area.

15                    I'm sorry, you then asked me?

16           Q     How you came to gain your expertise on  
17    the health impacts of PM10 and PM2.5.

18           A     Yes. After I moved to Morro Bay and  
19    heard about the plant and became very interesting  
20    in attending all the workshops, I started reading  
21    some of the AFC and some of the things that I  
22    didn't think were coming up in the workshops. And  
23    discovered the increase of the PM emissions of 76  
24    tons per year compared to the old plant.

25                    And somewhere in the back of my mind I

1 knew that particulate matter was a bad thing. So,  
2 I decided to independently, along with Ms.  
3 Churney, do some research on the health impacts  
4 that can result from PM10, and particularly PM2.5.

5 I proceeded by gathering all the  
6 relevant articles that I could find that were  
7 reasonably available and various medical  
8 libraries, including UCLA, Stanford, Cal Public  
9 Health, USC and actually got a number of articles  
10 from the South Coast Air Quality Board's public  
11 library.

12 And with that collection, which is now,  
13 as I mentioned earlier, grown to about 700  
14 articles, I proceeded to go through those and do  
15 an analysis, first focusing on impacts on  
16 children. Because I thought my gut instinct was  
17 that that would be a very important topic.

18 I proceeded to prepare an analysis on  
19 that basis based on the risk assessments found in  
20 these primarily epidemiological studies, and the  
21 data that was then available from going through  
22 the AFC and its appendices.

23 One of the numbers that we did not have  
24 at that point was full data on what the modeled  
25 concentrations would be for the new plant, without

1 including the Morro Rock.

2 So initially our report included the  
3 Morro Rock highs. And the numbers that we showed  
4 for the various end points were astounding.

5 So, at that point we brought it to the  
6 City Council's attention and Duke's response was  
7 that we were focusing on a wrong number, the 24-  
8 hour high on the rock is not real. So, I agreed  
9 with them and tried to get the data. And went  
10 back and we analyzed that. And in addition,  
11 prepared a second report on other susceptible  
12 populations including the elderly and those with  
13 various chronic diseases.

14 Q In the course of preparing these reports  
15 did you review, read all 700 articles that you've  
16 collected?

17 A I reviewed them, I didn't read each of  
18 them in total detail. Some of them relate to  
19 mechanisms of appropriate monitoring and filtering  
20 and things of that sort, which I didn't find  
21 particular relevant to what I was doing.

22 But, certainly, I would say about 400 of  
23 them I have been through in pretty good detail.

24 Q Could you briefly summarize the findings  
25 of the revised January 2002 children's report,

1 which is attachment A to your declaration?

2 A Yes. Again, I'll highlight first just  
3 some of the health problems that do result from  
4 exposure to PM. These include increases in risks  
5 of infant mortality from respiratory causes,  
6 including SIDS. Increased hospital admissions of  
7 children for respiratory illness, primary care  
8 clinic and doctor visits; increased medication use  
9 in asthmatic children; decreased lung function and  
10 lung growth in children.

11 An increase in premature births, lower  
12 birth weight and smaller head circumference at  
13 birth. Increased emergency room visits for asthma  
14 and pneumonia by children. Increased cough,  
15 phlegm, wheeze and breathing difficulties in  
16 children. And altered and reduced immune function  
17 in children.

18 And not surprisingly, given all that, a  
19 higher school absenteeism.

20 Without going into the details of  
21 exactly what each study showed, which I think is  
22 set forth pretty carefully in the report, itself,  
23 I just wanted to hit those highlights.

24 Applying those to the data that we had  
25 collected from the Duke filings of one sort or

1 another, I prepared a table which is on page 8 of  
2 that report, which is attachment A to my  
3 declaration, which showed that even though  
4 emissions for NOx and CO are going down  
5 significantly, and PM is going up, every single  
6 pollutant that is modeled, in fact, increases in  
7 concentration in Morro Bay. And that's primarily  
8 because of the lower stacks and the low exhaust  
9 velocity and temperature with the new plant as  
10 compared to the existing plant, with its very tall  
11 stacks and higher velocity and temperature. So  
12 that more of it will stay here, in other words.

13 I was not particularly concerned about  
14 the CO and the NOx increases because those levels  
15 in Morro Bay are way below the state standards.  
16 And there's nothing in the literature that I found  
17 that indicated that there was not, in fact, a  
18 threshold for those.

19 PM, on the other hand, there is no  
20 threshold for, in terms of an absolutely zero risk  
21 level of safety. Therefore, I concentrated  
22 particularly on the PM emissions and increased  
23 concentrations.

24 And, again, in this County generally  
25 it's better than most, but still it seems the 24-

1 hour standards, from time to time, although it was  
2 apparently just in one case in the last three  
3 years here in Morro Bay, have nothing to do with  
4 the plant, but having to do with a wildfire.

5 In addition, the current state annual  
6 standard is not being exceeded here. But the  
7 proposed new standard would be exceeded here, if  
8 adopted. And I can talk about that a little bit  
9 later.

10 Let's see, I guess the other important  
11 point about that report is that we tried to take  
12 to heart the criticism we had received earlier,  
13 and tried to be extremely, I hate to use the word  
14 conservative, and by that I mean proceeding with  
15 numbers that would, in fact, under-estimate the  
16 actual risks.

17 We looked at two things. One was the  
18 assumption that the annual increase that was  
19 modeled would, in fact, occur every day. And  
20 there would be no days where it peaked above that,  
21 as suggested by Mr. Willey and the Air District  
22 Board as a way to get at what the typical increase  
23 would be.

24 And then we also took what we tried to  
25 calculate by various ratios from the data we did

1 have, the maximum 24 increase other than at the  
2 rock. And both of those numbers are in here. And  
3 the maximum increase essentially for using the  
4 annual number as a little bit under 1 mcg  
5 increase. And using the 24-hour number, we  
6 calculated it at about 8.3, in fact, using the  
7 numbers that Mr. Rubenstein provided at hearing,  
8 that is an under-estimation, in itself, and that  
9 would be somewhere between 9 and 10, closer to 9,  
10 I think, that with the actual numbers from their  
11 modeling.

12 Q Did your review of the literature also  
13 include studies that included Santa Maria and  
14 Atascadero in San Luis Obispo County?

15 A Yes. As a matter of fact, there are a  
16 couple of them in here that were done as a part of  
17 a project with about somewhere between 10 and 15  
18 cities in southern California, including amongst  
19 those were Atascadero and Santa Maria.

20 In the report on page 13 in the bullet  
21 points, one of the cities cited under that showed  
22 there is a decline in lung function included that.  
23 It was also one of the studies that showed the  
24 increased absenteeism in school. And off the top  
25 of my head those are the two that I can think of

1 immediately.

2 But it was interesting because  
3 Atascadero was relatively low compared to most of  
4 these other cities, in terms of overall background  
5 concentrations, but it had the highest asthma rate  
6 of any of those cities in the study.

7 Q And did you also look at data which  
8 compared Morro Bay to Atascadero?

9 A Yes, I did. I had received a copy of  
10 APCD recent report that was done on February 21st,  
11 which was a summary by Mr. Carr in connection with  
12 his departure about the trends that had occurred  
13 in the various pollutants in the County. And that  
14 included the PM10 trend. And he very nicely  
15 included a chart comparing -- showing the PM in  
16 Paso Robles, Atascadero, and Morro Bay.

17 Now, for those of you who are not from  
18 here, Atascadero and Paso Robles are at least two  
19 and a half to three times larger than Morro Bay in  
20 terms of population.

21 MR. HARRIS: Excuse me, Mr. Fay. I  
22 guess I want to object on the basis that I'm not  
23 sure this is in any of the prefilled testimony.  
24 And so I don't know where she's going.

25 HEARING OFFICER FAY: All right. We'll



1       admonish the witness to keep it within her area of  
2       expertise or reference --

3               MS. SODERBECK:  I didn't make copies of  
4       this, but --

5               HEARING OFFICER FAY:  -- part of your  
6       testimony.

7               MS. SODERBECK:  -- I'd be happy to make  
8       copies for everybody.  I mean it's a public  
9       document from CARB.

10              MR. HARRIS:  My point is that it's not  
11       in the prefiled testimony.  And that requirement  
12       allows us to prepare.  And obviously since this  
13       was not in the prefiled testimony, we haven't had  
14       the opportunity, which we should be afforded, as  
15       to prepare for this type of information.

16              MS. CHURNEY:  This information, it's  
17       come up now because she did take a look at it in  
18       connection with this study.  It will come up in  
19       rebuttal, and we will offer the document in  
20       rebuttal, as well.

21              We can hold it until then if you wish,  
22       and she can discuss it then.

23              MR. HARRIS:  Again, if you have  
24       documents that you know you're going to use, those  
25       should be prefiled.  And so whether you're going

1 to introduce it on direct or as rebuttal, those  
2 things ought to be prefiled. And they're not  
3 prefiled. We have not been given the opportunity  
4 to prepare on these issues. And that's unfair  
5 surprise.

6 HEARING OFFICER FAY: What I'm going to  
7 do is let the witness go ahead. And essentially  
8 sustain Mr. Harris' objection by according him the  
9 opportunity to return to this matter at his  
10 discretion with rebuttal at a later time, if you  
11 need.

12 MS. SODERBECK: The only point I was  
13 making with those figures was that all of  
14 Atascadero and Paso Robles have lower PM levels  
15 than did Morro Bay in the last several years, even  
16 though they're substantially more populated and  
17 are right in the middle. They're both  
18 transected, I guess, by the highway 101. So  
19 there's a lot more traffic there.

20 BY MS. CHURNEY:

21 Q And could you also please summarize your  
22 findings with respect to the report on the elderly  
23 and other susceptible populations which is  
24 attachment B to your declaration?

25 A Yes. After coming to the conclusions

1       that we arrived at with respect to the risks to  
2       children, the studies that they had been reviewing  
3       all highlighted other susceptible populations, as  
4       well, including the elderly and with some overlap  
5       in the fact that anyone who has any chronic  
6       cardiovascular or respiratory disease, or cancer  
7       or diabetes, according to the latest studies, are  
8       impacted more severely by PM increases than the  
9       rest of the population.

10               That was of concern because according to  
11       the latest census data, Morro Bay has a very high  
12       percentage of elderly. And that's what I'm  
13       referring to as 65 and older, and along with about  
14       15 percent of the population being under 18. So  
15       you have a very large susceptible population risk  
16       pool in town here.

17               The other things that I covered in here,  
18       well, basically just to give a little summary, the  
19       page 16, table 1 in that attachment B takes the  
20       increased risk that occur for mortality and  
21       hospital admissions in these various subgroups,  
22       and by subcategory.

23               For example, those with cardiovascular  
24       disease and those with respiratory disease have  
25       significantly increased mortality rates compared

1 to the rest of the population when you're  
2 comparing increased risk from PM.

3 That table, again we tried to be very  
4 conservative, we took the analysis both from the  
5 assumption that the annual modeled number would  
6 never vary on any day. And that again, using the  
7 24-hour modeled max excluding the rock, to sort of  
8 outline this as the high end parameter of what  
9 could happen.

10 A couple other issues that are addressed  
11 in that report, which are very significant, are  
12 it's been argued that with respect to the short-  
13 term impacts of the daily swings in PM, that the  
14 mortality increases that occur in that situation  
15 may be people who are on death's door and die a  
16 day or two earlier than they otherwise would have.

17 And there's a whole series of studies  
18 now that show that that absolutely is not the  
19 case. That there is a real impact from these 24-  
20 hour increases that can cause mortality and a  
21 whole number of other health problems, as I'd  
22 mentioned earlier that is above what you get from  
23 simply looking at a chronic standpoint.

24 There is no -- in effect, there is no  
25 peak of people dying in a couple of days, and the

1 normal death rate dips for a couple days, and  
2 comes back. That would be what was happening if  
3 this mortality displacement were, in fact,  
4 occurring. But that does not occur.

5 Finally, the other issue that I  
6 discussed extensively in that particular report is  
7 the fact that there has -- in the literature  
8 there's absolutely no indication of any  
9 thresholds, as I mentioned earlier, for PM. And  
10 that the relationship between the dose and the  
11 response in this case -- the PM, it's absolutely  
12 linear.

13 That means that -- you might want to put  
14 this up -- that means that a 1 mcg per cubic meter  
15 increase, whether you're at the 15 mcg background  
16 concentration or whether you're at a 90 background  
17 concentration has the same adverse impacts.

18 I believe Mr. Ringer had pointed out,  
19 and he is correct, that this figure that was just  
20 put up, it was attached to my declaration, this  
21 came from the Zanobetti and Schwartz study. And  
22 it shows for ten cities, these are actually  
23 datapoint lines, and it goes all the way down to  
24 about 2, 3 mcg in background concentrations. That  
25 this is about as linear as you can ever see on an

1 actual datapoint basis.

2           There is a greater level of uncertainty  
3 towards the bottom, but nonetheless it's very  
4 consistent. So the arguments that had been made  
5 earlier about the fact that we're at a very low  
6 concentration here, that's great. It doesn't mean  
7 that we should make it any worse, however.  
8 Because there will be the same effect.

9           Q     Could you summarize why you believe  
10 Duke's PM10 emission rates are being understated?

11          A     Sure. I think, since we're going to be  
12 covering that on rebuttal, it probably is best to  
13 do it in that context instead of trying to  
14 separate them out.

15          Q     Okay.

16           MS. CHURNEY: We will reserve that issue  
17 then for rebuttal and move on.

18 BY MS. CHURNEY:

19          Q     Could you summarize briefly what you  
20 believe the problems there are with Duke and  
21 staff's approach to mitigation?

22          A     Yes. The local increase in the  
23 concentrations of PM are of what is primary  
24 concern from the health standpoint. It's not so  
25 much the total emissions, but how much you're

1 actually breathing, which is what stays here.

2 As both Duke and staff experts have made  
3 clear, the ERC program is for regional mitigation.  
4 And it may have some impacts on local, but it's  
5 not intended to cover local. And I think that  
6 that local impact here in Morro Bay is what's been  
7 ignored, not by design. For example, the APCD, I  
8 don't believe, has any authority really to deal  
9 with it, since the standards are, in effect, being  
10 met.

11 One of the problems I see is that 43  
12 percent of the ERCs are from SOx, which is a  
13 predecessor -- precursor of PM. Precursors do not  
14 have the same dispersion impacts as direct PM. We  
15 have direct PM2.5 that will be coming out of this  
16 new plant. And we're substituting credits from a  
17 precursor that may not have developed into PM  
18 until somewhere, you know, south, maybe Santa  
19 Maria or off the ocean somewhere. And we're  
20 giving credits for that for pollution from PM2.5  
21 that's going to increase the local concentration  
22 right in Morro Bay.

23 And I disagree with the use of the  
24 cessation of the fuel oil burning. I think this  
25 Committee can still look at the appropriateness of

1       whether that is, in fact, paper mitigation or not.  
2       But fuel oil burning stopped in 1995. And 51  
3       percent of the ERCs for PM10 come from that, which  
4       if I'm correct and that's truly not actual  
5       mitigation, the ERCs would be short by at least  
6       104 tons per year.

7               The reason it's believe it's paper  
8       mitigation is that in this analysis is to be  
9       determined, as Mr. Willey pointed out, there could  
10      not be credit given if Duke had no ability to use  
11      that oil again. And under those rules that were  
12      in existence, when they ceased firing the oil in  
13      1995, the NOx rules came in and prevented them  
14      from using it. And that the new NOx limitations,  
15      with the plant as it is, which is what we have to  
16      look at, I think, here, they couldn't  
17      realistically burn that again. It would be above  
18      the NOx limitations.

19             And finally, as to mitigation I think  
20      it's clear that the duct firing is  
21      disproportionately dirtier. And I understand Mr.  
22      Rubenstein's testimony as to the, that it's just  
23      the same, look at the gas per unit burned, but in  
24      all due respect, that's a total red herring.  
25      Because what you really need to look at is they're



1 getting the last 168 megawatts of electricity,  
2 which is what, in fact, they're in the business of  
3 producing, they're not in the business of burning  
4 fuel just to burn fuel, that last 168 megawatts  
5 you are getting substantially more PM emissions  
6 than you were getting for any other 168 megawatts  
7 that are being burned on baseload.

8 And as we heard earlier, in fact, that  
9 assumption is that only the 4000 hours duct firing  
10 can occur, and as we've heard just previously, it  
11 could be a little more than that.

12 Q Do you believe the effect estimates  
13 stated in the two reports are conservative? That  
14 is, understating the likely actual adverse  
15 impacts?

16 A Yes, I do. As I mentioned in the  
17 earlier testimony, first of all, even if Messrs.  
18 Rubenstein and Ziemer were correct, that the  
19 modeling that they used, the ISC modeling, is very  
20 conservative and may overstate the actual  
21 concentrations from the new plant emissions by a  
22 factor of four to 12, I believe is what Mr.  
23 Rubenstein used, I believe that we have been  
24 equally overly conservative in preparing our  
25 assessments of the adverse risk effects on health

1 by a factor of at least that much, if not more.

2 Again, to summarize. First, we tried to  
3 be extremely conservative in using only the annual  
4 increase concentration as though it occurred every  
5 single day. And did not take into account the  
6 fact that with varying conditions such as weather  
7 and operational loads and things of that sort,  
8 that there would mostly likely be a number of days  
9 which the increases will be substantially above  
10 that 1 mcg.

11 We also used a very conservative method  
12 of estimating the impacts, excluding the rock, as  
13 I have explained, since that data had not been  
14 available to us before, we did a ratio analysis.  
15 And when we got that data from Mr. Rubenstein it  
16 actually showed that the numbers we should have  
17 been using were higher than what we used, which  
18 again meant that ours was an understatement.

19 Mr. Hartman, in his analysis, and in our  
20 reports, we both tried to be extremely  
21 conservative in using what we thought was the most  
22 unassailable risk level that could not be  
23 challenged, which came from the Sanut study, which  
24 showed all-cause mortality of .51, with an  
25 increase, 10 mcg increase in PM levels.

1           His calculations were based on that.  
2       That's how he got to his annual mortality risk  
3       ratio from the plant's emissions of being one in  
4       181,876, and the lifetime risk mortality of one in  
5       6,395. Clearly those are well below the one in a  
6       million standard that you would normally look at  
7       as significant.

8           Because we were so conservative, again  
9       we're understating here, because in fact the CARB  
10      and OEHHA review board, in looking at the new  
11      proposed PM standards that are coming down,  
12      strongly indicate that the appropriate number you  
13      should be looking at is the cohort studies long  
14      term impact, which is 4 to 7 percent.

15           And if that number were used on Mr.  
16      Hartman's report, for example, the annual  
17      mortality risk would drop down to one in 45,469,  
18      when using the 4 percent number; and one in 25,982  
19      using the 7 percent number as the high. And the  
20      lifetime risk would drop to one in 1,599 using the  
21      4 percent level, and one in 914 if you use the 7  
22      percent level.

23           Again, these are the numbers that are  
24      being used by CARB in doing their estimate of how  
25      many lives will be saved in California in

1 adjusting the standards that they are proposing.

2 So, it just demonstrates --

3 MR. HARRIS: Again, I'd ask -- can I ask  
4 again where this is in the prefiled testimony?  
5 None of these numbers are familiar to me. And we  
6 haven't had a chance to prepare to deal with those  
7 numbers. So can I ask again, where in your  
8 testimony, are those numbers? And if they're not  
9 in your testimony, I'd object on that basis.

10 MS. SODERBECK: I'm explaining why our  
11 numbers are conservative. The studies that were  
12 supplied with my report have those numbers in  
13 them.

14 MR. HARRIS: The point is you could have  
15 explained why they were conservative in your  
16 prefiled testimony. And there's no explanation in  
17 your prefiled testimony.

18 MS. CHURNEY: I think it's self evident  
19 from the documents, and the documents speak for  
20 themselves.

21 MR. HARRIS: Not to the rest of us, --

22 HEARING OFFICER FAY: Well, but then  
23 you'll have to --

24 MR. HARRIS: -- we didn't have the  
25 documents in advance is my point.

1 HEARING OFFICER FAY: -- you'll have to  
2 refer to where in the prefiled testimony.

3 MS. SODERBECK: In part this goes to  
4 rebuttal because I was -- the testimony was  
5 challenged by Dr. Walthers.

6 MR. HARRIS: Okay, well, then, you know,  
7 rebuttal testimony is obviously appropriate. But  
8 please point to the testimony -- our testimony  
9 you're rebutting. I'm just asking for a page  
10 number.

11 If you're giving direct testimony tell  
12 us where it is in your direct testimony. If  
13 you're saying, well, it's not direct, it's  
14 rebuttal, show us what you're rebutting.

15 HEARING OFFICER FAY: Mr. Harris. I  
16 think what you have to do now on direct is  
17 reference in your direct testimony the type of  
18 information that you're providing us. Then let's  
19 make a clear break and you tell us that your  
20 rebuttal testimony has begun so we can all be very  
21 clear on what's going on.

22 MS. SODERBECK: That's fine. Just in  
23 the interests of time I was trying to bring  
24 everything together at once. But I can save this  
25 for rebuttal, because the indications that they're

1 not conservative really do go to rebuttal.

2 MR. HARRIS: Again, rebuttal of what?  
3 I'm sorry, I'm not trying to be difficult. I'd  
4 just like page references either in our direct  
5 testimony or --

6 MS. SODERBECK: Do you want me to get  
7 the transcript out and show you the transcript  
8 reference?

9 (Parties speaking simultaneously.)

10 MS. CHURNEY: We'll reserve this for  
11 rebuttal. Let's move on with the direct we are --

12 MR. HARRIS: Wait a minute. What  
13 rebuttal?

14 HEARING OFFICER FAY: Okay, and now do  
15 yo intend to offer --

16 MS. CHURNEY: We'll do --

17 HEARING OFFICER FAY: -- rebuttal right  
18 after --

19 MS. CHURNEY: Correct, --

20 HEARING OFFICER FAY: -- your direct?

21 MS. CHURNEY: -- we'll go directly to  
22 rebuttal.

23 HEARING OFFICER FAY: Okay. And we'll  
24 reserve cross-examination for all of it  
25 together --

1 MS. CHURNEY: That's how you've done it  
2 with all the other witnesses --

3 (Parties speaking simultaneously.)

4 MS. CHURNEY: -- who have had rebuttal  
5 at the same time, yes.

6 HEARING OFFICER FAY: Okay. So complete  
7 the direct, and then move to rebuttal.

8 BY MS. CHURNEY:

9 Q Do you have any other support for why  
10 the studies are conservative that you do not wish  
11 to reserve for rebuttal?

12 A Trying to sort this out now. One thing  
13 that is in our direct testimony, in my direct  
14 testimony, the reports, themselves, do reference  
15 the fact, as I had mentioned, that Morro Bay has a  
16 very high percentage of susceptible population in  
17 elderly and in the children under 18 category.

18 Those numbers are in my direct. I can't  
19 give you the page numbers right off the top of my  
20 head, but I believe they totaled about 39 percent  
21 using the 2000 data, and it was about 42 percent  
22 using the 1999 U.S. census data.

23 And the numbers that we have used in  
24 making the calculations in the report do not, in  
25 any way, reflect the increases in risks that would

1 be attributable to those categories that the  
2 studies and the reports show are particularly high  
3 for that category of risk. We only calculated  
4 based on the across-the-board generalized number.

5 Q And do you have any proposed changes to  
6 the air quality conditions regarding mitigation?

7 A I do, but it probably makes more sense  
8 to do them after rebuttal.

9 Q And finally, do you have any financial  
10 or personal interest in the outcome of this  
11 proceeding?

12 A Absolutely not.

13 Q And have you been paid by anyone for the  
14 time and efforts you've spent on this proceeding?

15 A I could only wish. But the answer is  
16 no.

17 MS. CHURNEY: I'd like to move to  
18 rebuttal at this point.

19 MR. HARRIS: Before you begin, Bonita,  
20 could I ask for clarification. The figure that's  
21 up on the overhead here, where does that come  
22 from?

23 MS. CHURNEY: It comes, it is attached  
24 to the declaration, the report.

25 MS. SODERBECK: It's attached to I



1 believe what's the second report, attachment B to  
2 my declaration.

3 MR. HARRIS: So that is in your prefiled  
4 testimony?

5 MS. SODERBECK: Yes, it is.

6 MR. HARRIS: I'm sorry --

7 MS. CHURNEY: Moving --

8 MR. HARRIS: -- I'm sorry, --

9 MS. CHURNEY: Oh, okay.

10 MR. HARRIS: -- I'm just trying to find  
11 the document so we can get prepared. Was it in,  
12 not in the electronic copy, is that the issue  
13 here? It's only in the hard copy?

14 MS. SODERBECK: Yes, it's just in the  
15 hard copy. It's not something that I prepared.

16 HEARING OFFICER FAY: And can you give a  
17 little more reference to where it is? My copy has  
18 a report by Corio and Sherwell attached. Is it --

19 MS. SODERBECK: That's the children's  
20 report, if I can call it that, which is -- well,  
21 actually that's my declaration that has that  
22 attached.

23 There's also a report, attachment A to  
24 my declaration, which is dealing with the effects  
25 of particulate air pollution on children. And

1       there was a separate attachment B to my  
2       declaration which is the effects of particulate  
3       air pollution on susceptible populations other  
4       than children. Mortality displacement and absence  
5       of threshold.

6               And it's to that one that it's attached  
7       as an exhibit A, at the end of that declaration.

8               HEARING OFFICER FAY: Let's go off the  
9       record a minute.

10              (Off the record.)

11              HEARING OFFICER FAY: Just go through  
12       that one more time, please.

13              MS. CHURNEY: Okay, the graph that has  
14       been referred to had been attached as exhibit A to  
15       attachment B to the declaration of Pamela  
16       Soderbeck. It was there when we submitted it to  
17       docket. I have no explanation for why it's not  
18       there in the copies that have been received.

19              But the same graph is contained on page  
20       670 in the Schwartz and Zanobetti article, which  
21       is --

22              MS. SODERBECK: Attachment 21.

23              MS. CHURNEY: -- attachment 21 to that  
24       same attachment B to the declaration of Pamela  
25       Soderbeck. It's an epidemiology article dated

1 November 2000, volume 11, number 6.

2 And the graph is at the bottom left-hand  
3 corner of that page in a much smaller rendition,  
4 identified as figure 2.

5 HEARING OFFICER FAY: Okay, thank you  
6 for that. And just direction from the Committee  
7 to please follow up with dockets and confirm  
8 whether or not your document was filed in the form  
9 in which you intended it, and which you sent it to  
10 the proof of service. And if not, please supply  
11 them a corrected copy that conforms with the one  
12 you filed on the proof of service.

13 Okay. At this time we're going to take  
14 a break for lunch. We'll take a 45-minute break  
15 for lunch, and return here at 12:40.

16 We're off the record.

17 (Whereupon, at 11:59 a.m., the hearing  
18 was adjourned, to reconvene at 12:40  
19 p.m., this same day.)

20 --o0o--

## 1 AFTERNOON SESSION

2 12:49 p.m.

3 PRESIDING MEMBER KEESE: -- for today.

4 As you know we still have land use. We will go  
5 until we finish today, with a deadline of 6:00  
6 p.m. So if we should finish at 5:00 or 5:30, that  
7 will be the end and we'll come back and start on  
8 our other soil and water, visual, et cetera,  
9 tomorrow.

10 If we don't, we will continue right up  
11 till 6:00 p.m., and then at 6:00 p.m. we will  
12 break and start over tomorrow with anything that  
13 we have remaining on our schedule.

14 Mr. Ellison.

15 MR. ELLISON: I'm going to be handling  
16 the land use, that's why I'm addressing this  
17 issue. We do have one member of our panel, Mr.  
18 Van Buskirk, who will not be able to be here  
19 tomorrow, and I mentioned this to Gary Fay.

20 We would like, if at all possible, and I  
21 don't see any reason we shouldn't be able to do  
22 this, to get through today the direct and cross-  
23 examination of our witnesses; not necessarily all  
24 of land use, but our witnesses, anyway, --

25 PRESIDING MEMBER KEESE: The proposed

1 schedule would make it look like that should be a  
2 possibility. We will keep that in mind.

3 MR. ELLISON: Thank you.

4 PRESIDING MEMBER KEESE: Okay, thank  
5 you. Mr. Fay.

6 HEARING OFFICER FAY: Okay. Now we'll  
7 move forward with CAPE's rebuttal testimony on air  
8 quality.

9 MR. HARRIS: Mr Fay, before you begin  
10 with the rebuttal, I need to go on the record with  
11 a couple of things, if we could.

12 During the break we were handed a number  
13 of documents, a number of lengthy documents, and  
14 they were offered as rebuttal exhibits. I want to  
15 lodge, once again, our protest to the failure of  
16 CAPE to prefile those documents.

17 The regulations are very clear. This  
18 is, in my view, the quintessence of unfair  
19 surprise. They've had these documents for days,  
20 and in some cases, months. They've known about  
21 the prefiling requirement. And they simply  
22 elected to try to spring it on us. And I find it  
23 to be the kind of tactic that is offensive.

24 And not only is it offensive, it places  
25 my client at a severe disadvantage. And right now

1 my experts, instead of having the two weeks that  
2 CAPE's had to prepare for the testimony we're  
3 about to hear, are on the fly trying to read those  
4 documents and determine whether they are, in fact,  
5 even relevant to this proceeding.

6 And I want to note my objection to each  
7 and every one of those documents, and I'll go  
8 through them individually if you'd like.

9 But, Mr. Ellison and Ms. Churney have  
10 had a dialogue on this issue. We had it at the  
11 prehearing conference. We talked about the  
12 necessity for people to prefile their testimony.

13 And as late as, you know, 12:30 today,  
14 we get handed a stack of documents that they've  
15 obviously had in their possession since we started  
16 at 9:00 this morning.

17 And I find the tactics patently unfair  
18 and I want to put our objections on the record.

19 MS. CHURNEY: Well, if I might respond.  
20 There is no prefiling requirement in these  
21 proceedings for rebuttal testimony or exhibits.

22 MR. HARRIS: Please cite to the code for  
23 that --

24 MS. CHURNEY: No, I'm following --

25 MR. HARRIS: -- wrong --

1 (Parties speaking simultaneously.)

2 MS. CHURNEY: -- I'm following the  
3 prehearing order. I'm following each of the --

4 MR. HARRIS: Please cite to the  
5 prehearing order, then, --

6 MS. CHURNEY: Yes.

7 MR. HARRIS: -- because in neither case  
8 are --

9 MS. CHURNEY: Here's what the prehearing  
10 order --

11 MR. HARRIS: -- exhibits are not  
12 required to be filed --

13 MS. CHURNEY: Here's what the prehearing  
14 order provided, counsel. Parties intending to  
15 offer documentary exhibits as evidence shall also  
16 include a copy of such materials with their  
17 written testimony.

18 In this case there's a requirement for  
19 prefiling of direct testimony. There's no  
20 prefiling requirement for rebuttal. Accordingly,  
21 there's no requirement for filing rebuttal  
22 exhibits.

23 MR. HARRIS: That's a very contorted  
24 reading of that provision.

25 (Parties speaking simultaneously.)

1           HEARING OFFICER FAY: I'm going to cut  
2 off the debate at this point. Ms. Churney,  
3 essentially you've misread the order, and we may  
4 or may not allow some of these documents in.

5           If we do allow them in, it will be over  
6 applicant's objection, and only with the  
7 understanding that your witness may have to return  
8 at the discretion of the applicant to respond to  
9 questions once applicant has had a chance to  
10 digest this information.

11           But this does constitute a surprise.  
12 And in the past, while we have allowed rebuttal,  
13 we have always accorded that -- and rebuttal has  
14 never been in this dimension. It has been, you  
15 know, along the lines of oral rebuttal to the  
16 prefiled testimony, not written documents, in  
17 large volume, by the way, that were given to the  
18 opposing party at the moment of the hearing.

19           So, let's move ahead. Your objection is  
20 noted, Mr. Harris.

21           MR. HARRIS: I'm going to ask my  
22 witnesses, Mr. Rubenstein and Mr. Walther, to look  
23 through those documents as CAPE is testifying. We  
24 may want the opportunity today to provide rebuttal  
25 to this surprise rebuttal.



1           And so I'd note that. And let me talk  
2 to my witnesses during one of the breaks and see  
3 if they're prepared to proceed today. I think  
4 they are --

5           MS. CHURNEY: I think --

6           HEARING OFFICER FAY: And I think --  
7 just a moment -- and I think one additional thing  
8 that would help is if you were aware of some  
9 limited purpose for which you're using some of the  
10 documents, please make that very clear. Because  
11 it may be that there's not a disagreement if it's  
12 being used for a narrow purpose, and/or the  
13 opposing witness is familiar with it, et cetera.  
14 And we can just move along and not have a big  
15 fight over these.

16           But if it's left in the general sense, I  
17 can see where we may have greater concerns.

18           MS. CHURNEY: No, and I think you'll  
19 find that most of these are offered for a very  
20 specific purpose, and we will indicate that as we  
21 have the testimony presented.

22           May I proceed?

23           HEARING OFFICER FAY: Please.

24 BY MS. CHURNEY:

25           Q     Ms. Soderbeck, do you agree with

1 Mr. Rubenstein's and staff's conclusions about the  
2 emission reduction credits or offset credits and  
3 local impacts?

4 A Well, I agree with them that emission  
5 offsets in the form of ERCs are not intended to,  
6 and do not necessarily provide any local benefits.  
7 And I further agree that decreases in emissions  
8 that result from the ERC regional program by  
9 nature precede the project that you are then going  
10 to be using the ERCs for.

11 And here, given the way that that system  
12 works, in effect, 51 percent of the emissions that  
13 had been eliminated when the plant ceased oil  
14 burning in 1995 are now coming back.

15 Q Do you agree with Mr. Rubenstein's  
16 interpretation or methodology for calculating PM10  
17 from duct firing?

18 A No. I don't disagree that what he was  
19 calculating was correct, as for what he was  
20 calculating. But I don't think that's applicable  
21 methodology for looking at whether the emissions  
22 from PM are disproportionate with the duct firing  
23 or without the duct firing.

24 I think, as I said earlier, when you  
25 evaluate the emissions produced from the last 168

1 megawatts, which comes from the peaker capacity,  
2 those emissions are going to be substantially  
3 higher than any other 168 megawatts from the  
4 project, because of the inefficiency factor.

5 It's simply a factor of the duct burning  
6 using substantially more fuel. Its fuel  
7 efficiency is 42 percent compared to the baseload  
8 efficiency of 55 percent. And those figures came  
9 from the staff's PSA on the fuel efficiency  
10 portion.

11 Therefore I disagree with looking at the  
12 emissions on the basis of the Btus of fuel burned,  
13 doesn't tell you anything about the quality of the  
14 air that's going to be coming out of there.

15 Q Do you agree with Mr. Rubenstein that  
16 the principal component of the plant's PM2.5  
17 emissions will be sulfates?

18 A No, I don't. And that goes to a couple  
19 of the exhibits that we had. The --

20 Q Could you identify first the exhibits  
21 that you're looking at?

22 A Sure. The first one that I'm looking at  
23 is called investigation of artifacts in  
24 condensible particulate measurements for  
25 stationary combustion sources. And this was

1 prepared by Stephanie Wien from GE Energy, is the  
2 lead author.

3 This was presented at the same seminar  
4 that Mr. Rubenstein had presented his paper at  
5 that we discussed at the earlier hearing.

6 And the only purpose for this is to show  
7 that GE's own analysis shows that the natural gas  
8 results primarily in organic and elemental carbon,  
9 followed by sulfates and smaller amounts of other  
10 items. So it's carbon that's principal.

11 That's the sole purpose for having that  
12 rebuttal -- exhibit, excuse me.

13 I would agree with Gary Rubenstein that  
14 the current monitoring techniques, it's very  
15 difficult to distinguish combustion particles from  
16 any particular source, one from another. But  
17 that, and the fact is one reason why the fact that  
18 the studies that we're using, the wide variety of  
19 studies that we were quoting from different  
20 cities, large and small, rural and urban, are  
21 robustly in agreement.

22 Because they all have -- combustion  
23 particles. And it's the combustion particles that  
24 are what's deadly.

25 MS. CHURNEY: If I could request that an

1 exhibit number be assigned to that document that's  
2 just been identified, the investigation of  
3 artifacts.

4 HEARING OFFICER FAY: Investigation of  
5 artifacts in condensible particulate measurements  
6 for stationary combustion sources --

7 MS. CHURNEY: That's correct.

8 HEARING OFFICER FAY: -- will be exhibit  
9 178.

10 BY MS. CHURNEY:

11 Q Do you recall Mr. Rubenstein's testimony  
12 about the ISC modeling being conservative because  
13 it used worst case conditions that could not occur  
14 in real life?

15 A Yes, I do.

16 Q Do you agree with that?

17 A I had a problem with the example that he  
18 used, because I think he talked about combining  
19 the example of a worst case emissions scenario at  
20 extremely cold temperatures, I think with 34  
21 degrees ambient temperature. He said were  
22 combined with worst case dispersion  
23 characteristics, which generally occur at warm  
24 conditions.

25 He did refer to the AFC appendix 6.2 and

1 table 6.2-2.2 in that regard, as setting forth the  
2 worst case assumptions.

3 When you look at that table in every  
4 case for all three years that were analyzed, 1994  
5 through 1996, for all four pollutants, including  
6 PM, the worst impacts occurred at 85 degrees  
7 ambient temperature, which is the same as the  
8 worst case dispersion impacts.

9 Which, at least for that particular  
10 example, to me says it's not particularly  
11 conservative.

12 And I would note also that that table  
13 does not evaluate what you might consider the more  
14 typical or average temperature at Morro Bay,  
15 somewhere in the mid 60s.

16 Q Do you recall Mr. Rubenstein's testimony  
17 that the PM emission rates used here were not  
18 based on GE's numbers, but rather on his own  
19 professional engineering judgment?

20 A Yes.

21 Q Why did you begin to examine the GE  
22 vendor data?

23 A In the, I guess it's exhibit 12, which  
24 is Duke's response to staff's permit data adequacy  
25 issues, paragraph seven of that exhibit, it

1 indicates that the PM emission rates were provided  
2 by the vendor.

3 And it goes on to explain that the  
4 basecase without SCR or duct firing is 9 pounds  
5 per hour, which was increased to 11 pounds per  
6 hour to cover the SCR, and then again to 13.3  
7 pounds per hour for the duct firing condition.

8 And because that referred to the vendor  
9 reference, I became interested in well, what's the  
10 vendor saying. And it's not an easy number to  
11 find if you're not in the business of buying gas  
12 turbines.

13 I also noted the reference in the  
14 October 1990 EPA draft new source review workshop  
15 manual, which, I believe, has never been  
16 finalized, but they're still using it nonetheless.  
17 It also indicates that normally a vendor guarantee  
18 should be obtained for BACT control systems, and  
19 that even then a guarantee might not be  
20 sufficient.

21 So I started looking at the emission  
22 rates from other projects. Typically they had the  
23 Westinghouse 501F turbines which were, I think  
24 came out a little bit earlier than these turbines,  
25 but at similar characteristics.

1           And the emissions rates that had been  
2           approved in those projects were all substantially  
3           higher than the baseload 9 pounds per hour. And  
4           just as one example, the Calpine Sutter project  
5           emission rate was 30.13 pounds per hour, but that  
6           was with duct burners and steam injection. But  
7           that compares to the 13.3 pounds per hour that  
8           Duke is using here.

9           And then I ultimately went through the  
10          CEC records process, and I obtained portions --

11          MR. HARRIS: Can you provide us  
12          reference? I don't know where you're going with  
13          this, and the Sutter number you just gave, to me  
14          sounds wrong. Is there a document that you can  
15          refer to?

16          MS. SODERBECK: Not that I have with me,  
17          but I can --

18          MR. HARRIS: That's the point.

19          MS. SODERBECK: -- look for it.

20          MR. HARRIS: Okay, well, it is material.  
21          I guess I'd move to strike the last statement  
22          about the Sutter numbers, because I think they're  
23          incorrect. And Mr. Rubenstein knows they're  
24          incorrect.

25          MS. CHURNEY: Is counsel testifying?



1 MR. HARRIS: Counsel's objecting --

2 (Parties speaking simultaneously.)

3 HEARING OFFICER FAY: We'll note the  
4 objection and subject to check, why don't you go  
5 ahead.

6 MS. SODERBECK: Okay. I did find three  
7 of their plants here in California that utilized  
8 the exact same GE turbine. That's Midwest Sunset,  
9 Elk Hills and Sunrise Cogeneration. In the  
10 documents that were provided by the applicants in  
11 those cases, the GE emissions numbers --

12 MR. HARRIS: Excuse me, are you going to  
13 be referring now to one of the --

14 MS. SODERBECK: Oh, I'm sorry, yes, --

15 MR. HARRIS: -- documents that --

16 MS. SODERBECK: -- to one of the --

17 MR. HARRIS: -- you brought with --

18 MS. SODERBECK: -- exhibits that --

19 MR. HARRIS: -- you today?

20 MS. SODERBECK: Yes, it is --

21 MR. HARRIS: Can you identify the  
22 document, what page you're on, please?

23 MS. SODERBECK: Yes, it's application  
24 for certification for the Western Midway Sunset  
25 Cogeneration Company project, is the cover page of

1       that.

2               MR. HARRIS:  So this is the AFC, it's  
3       not the approval for the project, is that correct?

4               MS. SODERBECK:  That's correct.

5               MR. HARRIS:  So you don't know what the  
6       actual approval was, then?

7               MS. SODERBECK:  No, I'm going by what  
8       the applicant filed in that particular case.

9               And this includes the exhibit -- I'm  
10       sorry, it's appendix O, and this relates to the  
11       gas turbine vendor data.

12              Under emissions for PM, under varying  
13       baseloads and varying ambient temperatures, in  
14       each case it's 18 pounds per hour.

15              The same is true, if you go further into  
16       that package, for the Elk Hills project, again  
17       varying baseload assumptions --

18              MR. HARRIS:  Again, can you give me a  
19       page number?  I'm not following -- these pages  
20       aren't numbered and I don't know where you're  
21       going.

22              (Parties speaking simultaneously.)

23              MR. HARRIS:  -- Elk Hills now --

24              MS. SODERBECK:  -- is the application  
25       for certification for Elk Hills.

1 MR. HARRIS: Okay, I've got the front  
2 page.

3 MS. SODERBECK: The next page of that  
4 which is labeled appendix K4A shows, again,  
5 varying load factors, varying ambient  
6 temperatures, but again the particulate emission  
7 rates are all 18.

8 And then finally, if you go a couple  
9 pages further on is the application for  
10 certification for Sunrise. And the first page  
11 after that application is the turbine emission  
12 calculations.

13 Again, the top set of boxes, if you  
14 will, it indicates it's the same turbine that  
15 we're talking about here, and it gives about four  
16 lines down its ambient temperature, which shows  
17 varying cases for the ambient temperature  
18 conditions, and two lines below that is the load  
19 level.

20 And again, they go through varying  
21 scenarios of load level, and in each case. You go  
22 down just above the stack exhaust gas analysis box  
23 down near the bottom, you'll see particulates in  
24 pounds per hour. And again it's 18, in every  
25 single one of those cases.

1           So, I began to get the idea that maybe  
2           the vendor's specs are 18.

3           MS. CHURNEY: Before we move on, could  
4           we also have that document marked for  
5           identification, and it's a compendium of the three  
6           applications for certification of Western Midway  
7           Sunset Cogeneration, Elk Hills Power Project, and  
8           Sunrise.

9           HEARING OFFICER FAY: Okay. The  
10          compendium of cover sheet is Western Midway Sunset  
11          Cogeneration Company project, volume 3, appendix  
12          NX. And it also includes Elk Hills volume 2,  
13          appendices with appendix K-4A attached. And then  
14          Sunrise Cogeneration Power project, volume 2,  
15          appendices, and a chart of turbine emission  
16          calculations is attached.

17          That will be marked exhibit 179.

18          MS. SODERBECK: If I could just -- my  
19          answer, I guess. Then when I heard Gary testify  
20          at the last hearings that his number was not based  
21          on any vendor data or guarantee, but his own  
22          professional engineering judgment, it just seemed  
23          to me to conflict with the earlier statement that  
24          had been made in exhibit 12.

25          //

1 BY MS. CHURNEY:

2 Q Did you gather any other data regarding  
3 emission rates from these turbines?

4 A Yes. I also looked for source tests on  
5 these particular turbines at other locations that  
6 use them. And these were some of the emissions  
7 tests that we, in fact, had handed out at the last  
8 set of hearings when we inquired whether Mr.  
9 Rubenstein had used these in his report. And I  
10 believe in each case he had indicated that he had.

11 Q So just to be clear on the record,  
12 counsel from Duke has had this next exhibit since  
13 the last hearings in January, is that correct?

14 A Yes.

15 Q Could you identify the exhibit?

16 A The first page of it is emission test  
17 report for emissions compliance of two General  
18 Electric Frame 7 EA turbines at the Frontera  
19 Generation Facility in Hidalgo County, Mission,  
20 Texas. And that's dated March to May 2000.

21 The next page, which is labeled table 3  
22 for the first unit, midway down the column shows  
23 that the permitted level of PM there was 20.5  
24 pounds. And the baseload on the test was actually  
25 11.91.

1           Table 4, unit 2, on the next page, again  
2           midway down you'll see the same thing. The actual  
3           source test on the PM10 showed 13.55. Again,  
4           these are baseload numbers, but they're all above  
5           the 9 pounds per hour baseload that is the basic  
6           assumption behind the Duke numbers.

7           MS. HOLMES: Can I just interrupt  
8           briefly and ask a question. Was that a document  
9           that was provided to all parties? Because it  
10          appears that --

11          HEARING OFFICER FAY: I don't have one.

12          MS. HOLMES: Yes.

13          MS. SODERBECK: Yes, we used it last  
14          time when we were referring to it, and we tried  
15          to -- we offered to, what do you call it,  
16          introduce it at that time, --

17          (Parties speaking simultaneously.)

18          MS. SODERBECK: -- held it for rebuttal.

19          MS. CHURNEY: We offered to have it  
20          identified at that time. And yes, I personally  
21          distributed it to everybody.

22          MS. HOLMES: But it didn't get an  
23          exhibit number?

24          MS. CHURNEY: No.

25          MS. SODERBECK: No, not at that time, it

1 didn't.

2 HEARING OFFICER FAY: Is that in the  
3 collection that you just handed out before we  
4 reconvened?

5 MS. CHURNEY: Yes.

6 MR. HARRIS: No, --

7 MS. SODERBECK: No, no.

8 MR. HARRIS: -- it's not.

9 MS. SODERBECK: No, because it was  
10 handed out before.

11 MS. CHURNEY: Oh, okay.

12 MS. SODERBECK: Sorry, we're on a cheap  
13 copy budget.

14 HEARING OFFICER FAY: All right,  
15 proceed.

16 MS. SODERBECK: If you'd turn to the  
17 test for that same facility on July 1999, again  
18 there is a table labeled table 3, and this was  
19 apparently for just one of the units. And it  
20 shows that the PM10 source testing there at  
21 baseload showed 18.95 pounds per hour.

22 The last part of that document is a test  
23 report for two cogeneration units for the GE Frame  
24 7EA turbines at Occidental Chemical Corporation,  
25 Ingleside Cogeneration Facility, again in Texas.

1           Again, there's a table 3 executive  
2       summary page on that, which shows the unit 1 and  
3       unit 2, the PM source test showed 10.24. And it  
4       looks like 2.03, so there's a wide range on the  
5       results of the source tests.

6           MS. CHURNEY: And, again, before we  
7       proceed, if I could have that marked for  
8       identification, emission test report for emission  
9       compliance of two General Electric Frame 7EA  
10      turbines at the Frontera Generation facility in  
11      Hidalgo County, Mission, Texas.

12           And the emission test report for the GE  
13      Frame 7 in Occidental, Texas. Again, it's a  
14      compendium.

15           HEARING OFFICER FAY: All right, that  
16      will be exhibit 180.

17      BY MS. CHURNEY:

18           Q     And do you have any further comments on  
19      emission rates?

20           A     Yes. As it happens, Mr Rubenstein's  
21      paper that was done that was exhibit, I think, 147  
22      in the last hearing, in which he analyzed the 92  
23      different test results. Showed that the average  
24      of all those test results, and again these were  
25      from a variety of size and model turbines.



1 But the average turned out to be 17.58  
2 pounds per hour, which, to me, is probably not  
3 necessarily coincidental with the 18 pound per  
4 hour vendor information.

5 Q Do you agree that Mr. Rubenstein's  
6 suggested preferred source test methodology for PM  
7 is valid?

8 A I don't think it is. In the same sense  
9 that Mr. Willey was talking this morning, it's not  
10 been approved by the EPA for anything other  
11 than -- let me back up. I'm talking specifically  
12 about the back half calculation, which Mr.  
13 Rubenstein thought should be done with EPA method  
14 8.

15 And the EPA actually requires --  
16 specifies a method 202 for that back half, or  
17 condensible PM measurement.

18 And I have attached to my declaration an  
19 article by Corio and Sherwell, which supports  
20 strongly why that 202 method should be used. And  
21 that there is a considerable under-counting of the  
22 particulate matter if you aren't using the correct  
23 method.

24 And, again, one of the --

25 MR. HARRIS: Excuse me, to where are you

1 referring with that last reference? Which  
2 document, which page?

3 MS. SODERBECK: I'm sorry, with the  
4 Corio and Sherwell article? That was attached to  
5 my declaration. Directly to the declaration.

6 MR. HARRIS: Whereabouts in that forest?

7 MS. SODERBECK: Well, the copy, as we  
8 have filed it, it directly follows my signature on  
9 exhibit -- 139?

10 MS. CHURNEY: Yes.

11 HEARING OFFICER FAY: Could you just  
12 read the title of the article and --

13 MS. SODERBECK: Sure. It's in-stack  
14 condensible particulate matter measurements and  
15 issues by authors Louis A. Corio and John  
16 Sherwell.

17 HEARING OFFICER FAY: Published in the  
18 Journal of Air and Waste Management Association --

19 MS. SODERBECK: Correct, volume 50,  
20 February 2000.

21 HEARING OFFICER FAY: Thank you.

22 Are you ready to proceed?

23 MS. SODERBECK: Yes, I'm sorry, I had to  
24 find the right page here.

25 One other thing with respect to the

1 model 202 and the sole reason for having the  
2 rebuttal exhibit, which is labeled PM2.5 test  
3 goals, which is identified most easily by --  
4 PowerPoint presentation, again that was made at  
5 the same seminar that Gary testified about last  
6 time, and in fact he referenced the GE study.

7 Again, these are -- I apologize, they're  
8 not numbered pages, but one, two, -- I think it's  
9 the 14th page, if I've counted correctly.

10 BY MS. CHURNEY:

11 Q Could you identify that page as best you  
12 can?

13 A It says PM2.5 mass with -- gas-fired  
14 process heater less than 1 ppm SO2 field data.  
15 And it's a graph.

16 That page shows varying test results,  
17 depending on what method you are using to measure  
18 the back half of condensible PM. And it shows  
19 probably the easiest to see it on is the run two,  
20 which shows the method 202 shows substantially  
21 more in this case, probably 90 percent or more PM  
22 than using another method. In this case it was a  
23 dilution tunnel method that does not utilize the  
24 EPA approved method.

25 So that's just as a way of an

1 illustration of the dramatic difference that can  
2 occur if the proper test method isn't used.

3 And, again, to bring this back  
4 specifically to the testimony by Mr. Rubenstein,  
5 even though the current AQ and FDOC condition  
6 requires 201A and 202, I believe it was Gary's  
7 testimony that the EPA methodology number, EPA8  
8 methodology number supported his judgment in  
9 coming up with the emission rates that were, in  
10 fact, being used by Duke here.

11 And it's my view that if that is the  
12 case, then those rates again are understated,  
13 probably significantly.

14 MS. CHURNEY: If I could request that  
15 that last document be marked for identification as  
16 an exhibit. And, again, that's the PowerPoint  
17 presentation documents PM2.5 test goals.

18 HEARING OFFICER FAY: All right, that  
19 will be marked as exhibit 181.

20 BY MS. CHURNEY:

21 Q What is the impact of incorrect emission  
22 rates are used in making the analysis?

23 A Well, all of the ISC modeling was done  
24 using those proposed emission rates, including  
25 that that was done by Mr. Ziemer on behalf of the

1       APCD, and verified the results.

2               And I'm presuming that that was true  
3       with staff's verification for modeling, as well.

4               So that if the emission rates are, in  
5       fact, significantly understated, so are the  
6       resulting modeled concentrations of PM.

7               Q     Do you recall Mr. Rubenstein's testimony  
8       regarding the impact of duct firing on the  
9       quantity of PM emissions?

10              A     I recall his testimony, and I, in fact,  
11       reviewed the transcript in that regard.  And I  
12       disagree with his conclusions there.

13              I agree with his calculation that PM  
14       emissions would decrease by 18.4 tons per year, or  
15       about, that's about 9 percent of the total 203.2  
16       tons in PM emissions now -- I shouldn't say now,  
17       as set forth in the Duke documents as the maximum  
18       from the new plant.

19              But he also indicated that the ambient  
20       concentrations of PM would decrease only by less  
21       than 5 percent with the elimination of the duct  
22       firing.  And that does not make sense to me when  
23       the modeled concentrations are increasing locally  
24       because of the shorter stacks and the lower  
25       exhaust heat and velocity.

1           Q     Do you recall Dr. Walthers' rebuttal  
2     testimony to your declaration, and the  
3     applicability of the studies and the reports to  
4     understanding what the adverse air impacts will be  
5     here in Morro Bay?

6           A     Yes.

7           Q     Let's go through the issues raised one  
8     at a time. First, do you agree it is  
9     inappropriate to apply results of epidemiological  
10    studies to the analysis of the potential  
11    significant adverse effects that may result from  
12    the project?

13          A     I would strongly disagree. These  
14    epidemiological studies are exactly what all the  
15    agencies who are attempting to evaluate public  
16    health impacts of PM look at and rely on.

17                And this Committee is basically, in  
18    essence, doing the very same thing under CEQA,  
19    asked to determine, based on the best available  
20    information, what the likely potential adverse  
21    impacts are with respect to air. Those studies  
22    remain the best available information to judge  
23    that.

24                It's clear, for example, in the most  
25    recent CARB/OEHHA draft report, which is

1 supporting that proposed changes to the state  
2 standards, that that's exactly what they look at.  
3 And the reason is that these studies come from a  
4 wide variety of cities, large and small. As I  
5 said earlier, rural and urban, and from five  
6 different continents.

7 And they all are remarkably robust  
8 coming to the same conclusions. That is a very  
9 strong -- is a strength of those studies.

10 Yesterday I received a telephone call  
11 from Dr. Greg Thomas, who is the County Health  
12 Officer here. And he --

13 MR. HARRIS: I'm going to object. Now  
14 we're not even having rebuttal testimony, we got  
15 rebuttal reports of telephone calls. This is  
16 totally unfair to spring something like this on  
17 us, when it's been more than 24 hours since you've  
18 had this information.

19 MS. CHURNEY: No, excuse me, this was  
20 just -- information was just received.

21 HEARING OFFICER FAY: We could use Mr.  
22 Thomas here, but this is obviously hearsay. And  
23 it's a surprise, puts applicant at a disadvantage.  
24 So I'm going to have to sustain the objection.

25 MS. CHURNEY: Well, hearsay of

1 discussions between experts is normally allowed.  
2 And furthermore, you have allowed other hearsay  
3 during the course of these proceedings from Duke,  
4 and have indicated that you will allow the  
5 testimony and give it the proper weight at the  
6 time of consideration.

7 HEARING OFFICER FAY: Well, the problem  
8 is the surprise factor. And that's my biggest  
9 concern.

10 MS. CHURNEY: Well, this is --

11 MR. HARRIS: There's not even a document  
12 here. There's not even a report of a telephone  
13 conversation.

14 (Parties speaking simultaneously.)

15 MS. CHURNEY: She was going --

16 MR. HARRIS: -- here, it's --

17 MS. CHURNEY: She's going to give the  
18 report. It just occurred.

19 MR. HARRIS: It just occurred, and it is  
20 in violation of both the prefiled testimony  
21 requirements, the hearsay and probably a dozen  
22 other things if we took the time to analyze it.

23 This is exactly the type of unfair  
24 surprise that we've talked about earlier. And  
25 that's why you needed two hours to do this direct.



1 If you'd stayed on your direct testimony we'd be  
2 done.

3 MS. CHURNEY: I'm --

4 MR. HARRIS: So I need to object to you  
5 bringing in all representations as being outside  
6 the scope of the hearing.

7 MS. CHURNEY: Are you suggesting,  
8 counsel, that CAPE is not allowed to have rebuttal  
9 testimony in response to --

10 MR. HARRIS: I'm suggesting not in this  
11 format. Absolutely. You cited a hearing order  
12 incorrectly. You cited no regulations --

13 HEARING OFFICER FAY: Okay, Mr. Harris,  
14 we're going to sustain the objection. And we can  
15 abbreviate this by the ruling.

16 Please go ahead without that citation or  
17 quote.

18 MS. SODERBECK: Well, just to reiterate  
19 that this is the same exact procedure by which you  
20 would make the analysis using those studies,  
21 whether you're talking about a single project, or  
22 whether you're talking about protection of the  
23 health of the entire state. Those are the studies  
24 that you look at.

25 And it also came up in rebuttal last

1 time as to whether there was any examples of this  
2 methodology being applied specifically to analyze  
3 particular power plants. And Mr. Hartman  
4 indicated there was. At that time it was yet  
5 unpublished, or he thought it was.

6 Truth be told, it had just been  
7 published. And that's an article by Levy and  
8 Spengler. And that's precisely the kind of  
9 analysis that they undertook there to determine  
10 what the mortality savings would be from two  
11 specific power plants located in Massachusetts  
12 that would -- those plants to come up to BACT  
13 levels and focused on a secondary particles with  
14 that. And it's precisely the methodology that was  
15 used there.

16 BY MS. CHURNEY:

17 Q Could you identify that article, please?

18 A It's an article entitled modeling the  
19 benefit of power plant emission controls in  
20 Massachusetts by Jonathan Levy and John Spengler.  
21 And that's in the Journal of Air and Waste  
22 Management Association, volume 52, page 5 through  
23 18. And that was in the January 2002 issue.

24 MS. CHURNEY: And before we proceed I  
25 would like to have that marked as an exhibit for

1 identification.

2 HEARING OFFICER FAY: That will be  
3 marked exhibit 182.

4 BY MS. CHURNEY:

5 Q Does the size of the community studied  
6 in the literature in any way affect the  
7 application of those studies in the analysis to  
8 Morro Bay?

9 A Not at all. Again, the CARB/OEHHA draft  
10 report makes it absolutely clear that that is the  
11 robust strength of those articles, is that they  
12 cover a wide variety of communities with varying  
13 socioeconomic, meteorologic, co-pollutant factors  
14 and they still came to the same conclusions on a  
15 variety of the health point -- end points which  
16 are whether you're measuring hospital admissions,  
17 mortality increases, et cetera, et cetera.

18 And there are also a variety of studies  
19 which make clear that it's the PM2.5, the  
20 combustion PM that causes, most particularly  
21 causes the adverse health effects.

22 And the entire amount of combustible PM  
23 coming out of the plant, by definition, is  
24 combustion PM, which will be carbon and sulfate.

25 Q Have the potentially confounding effects

1 mentioned by Dr. Walther of whether age, sex, race  
2 and culture been adequately addressed in the  
3 studies cited in the reports?

4 A In all recent reports the answer is yes.  
5 Some of the early reports didn't have quite the  
6 same statistical methodology to handle those  
7 confounds. But, the same criticism about the  
8 potential compounds are those that are always made  
9 by the Electric Power Research Institute, the  
10 Engine Manufacturers Association, et cetera.

11 And they are routinely rejected by those  
12 who are making the public health authorities as  
13 being incorrect.

14 There are two cohort studies, and I  
15 should explain the difference between cohort and  
16 time series study. Cohort studies actually follow  
17 specific individuals over a long period of time.  
18 And the authors know what the socioeconomic  
19 situation is for the individuals. They know their  
20 health background. They know whether they smoke  
21 or not, and those sorts of factors.

22 Time studies never identify the  
23 individual. They just follow what happens to the  
24 unidentified group of people over, for example, a  
25 24-hour or three- or four-day period after a

1 particular exposure to PM.

2 In these cohort studies, the long-term  
3 studies, all of these factors are very carefully  
4 controlled for. And, in fact, one of the most  
5 famous of these cohort studies is an ongoing  
6 series by the American Cancer Society And again,  
7 just last week, an updated study came out of them  
8 by Pope, et al, in which it reported the findings  
9 of the cohort study now for a period of 16 years.

10 And amongst the factors that that study  
11 controlled for were age, sex, height, weight,  
12 smoking status, alcohol consumption, diet  
13 variables, marital status and occupational  
14 exposures, in addition to the usual weather,  
15 seasonal and time period controls.

16 So all those things are being controlled  
17 for. And that study confirmed the earlier studies  
18 which are in my reports, that there are increased  
19 mortality risks for a 10 mcg increase in PM2.5 or  
20 a 4 percent for all cause mortality; 6 percent for  
21 cardiopulmonary mortality; and 8 percent for lung  
22 cancer mortality. And that was the -- it was  
23 highest for lung cancer amongst those who had  
24 never smoked.

25 Just to put it in perspective, the 10 mg

1       increase is about -- is only slightly more than  
2       what the modeled results show for the max 24-hour  
3       from the new plant, excluding the rock. That  
4       number can run to be a little over 9 mcg.

5               And even if you look at the 1 percent,  
6       I'm sorry, the 1 mcg increase on the annual basis,  
7       as the very very conservative number, you're still  
8       talking about very significant increases in these  
9       categories of mortality. And that's only what the  
10      study was about at this point.

11             And, again, that study just came out of  
12      the Journal of American Medical Association last  
13      week. I obtained a copy on Friday. It was in the  
14      March 6, 2002 journal, and is amongst the exhibits  
15      that we passed out for rebuttal.

16             It's entitled, lung cancer,  
17      cardiopulmonary mortality and long-term exposure  
18      to fine particulate air pollution by C. Arden  
19      Hope, III, et al.

20             MS. CHURNEY: If I could have that last  
21      document marked for identification as an exhibit?

22             HEARING OFFICER FAY: That will be  
23      exhibit 183.

24             MS. SODERBECK: One final comment on  
25      that point. The cohort studies, such as this one,

1 they're also supported by the time series studies  
2 for the short-term impacts, and those time series  
3 studies do not have the problems of confounding  
4 for individual characteristics. Basically the  
5 only confounds of those studies are weather and  
6 co-pollutants, and they're very sophisticated  
7 models that have been developed to basically  
8 eliminate those confounds.

9 BY MS. CHURNEY:

10 Q Does the size of the community studied  
11 in the literature in any way affect the  
12 application of those studies to the analysis here  
13 in Morro Bay?

14 A I think I already covered that --

15 Q Yeah.

16 A That's why I'm confused.

17 Q Does the absence of clinical  
18 toxicological studies impact your conclusions?

19 A No. Dr. Walthers had pointed out that  
20 there's a lack of clinical studies in -- area, and  
21 quite appropriate, this is not Nazi Germany. As a  
22 society we do not allow, in general, for human  
23 experimentation to determine exactly how high the  
24 level of PM has to be before it kills you. Or  
25 even begins to have damaging effects.

1           On the other hand, there have been a  
2       couple of recent clinical studies that involve the  
3       use of the actual PM filters that had been put in  
4       storage from studies that have been done in the  
5       Utah valley in the mid 1980s.

6           Those series of studies, which are cited  
7       in the reports, are very famous in this area,  
8       because the principal source of PM in that area  
9       was a steel mine. And it closed down as a result  
10      of a strike for a year. And it absolutely  
11      provided great data for scientists to go in and  
12      look at what the health impacts were before it  
13      closed, what the air emissions levels were before  
14      it closed. Again, looked during the year that,  
15      year and a half that it was closed, and compared  
16      that to again when it started back up.

17           MR. HARRIS: Which study are we talking  
18      about now? Is this one of the documents you  
19      passed out, or --

20           MS. SODERBECK: No, no, this is a study  
21      cited in my report, and it's a whole series of  
22      studies by Pope that relate to the Utah valley.  
23      Do you want me to go -- I can refer them to you if  
24      you'd like on the reference sheet, but.

25           In any event, they saved these filters.



1 They had done the epidemiological studies showing  
2 that there were dramatically reduced health  
3 impacts for the year that the plant was closed.  
4 And that they shot back up immediately after the  
5 plant -- the steel plant -- mine was opened again.

6 Those filters were taken and used in  
7 clinical studies, and injected those levels into  
8 rats in one study. And in another case, they had,  
9 I think it was about 24 human volunteers who  
10 agreed to be injected with those levels. And the  
11 clinical studies confirmed exactly what the  
12 epidemiological studies confirmed, is that they  
13 showed the damaging effects looking at the tissue  
14 samples that supported the same findings in the  
15 earlier epidemiological studies.

16 BY MS. CHURNEY:

17 Q Dr. Walthers also faulted application of  
18 the existing literature because it does not  
19 contain speciation data. That is chemical  
20 composition breakdowns for PM. Do you agree?

21 A I agree that that's a problem in the  
22 literature. It's a problem because technology has  
23 not gotten to the point where that can easily be  
24 measured in most studies.

25 It's only been very recently that some

1 of the EPA superfund sites that they actually do  
2 the composition breakdown and analysis.

3 I don't think that's a problem with all  
4 of the studies, however, because the -- I should  
5 say with the literature, because a couple of  
6 studies that I have seen from those sites that do  
7 that analysis. And I think in my paper, just for  
8 your reference, it's the Mar, et al and Tolbert,  
9 et al studies in the report on the elderly and  
10 other susceptible populations.

11 They analyze separately the risk ratios  
12 from elemental carbon and organic carbon and total  
13 carbon combined. And they found the exact same  
14 ratios.

15 And, again, those are the particles  
16 which make up the substantial majority of the  
17 PM2.5 that will be coming out of the plant here.

18 Q Dr. Walthers testified that PM10 adverse  
19 health effects do not occur on just one day, that  
20 is one 24-hour period. Do you agree with that?

21 A The classic answer, yes and no. It is  
22 untrue that there can be no symptoms, acute  
23 symptoms in the course of a 24-hour period based  
24 on the most recent, ongoing current exposure to  
25 PM. That can occur.

1           It is true, however, that most of the  
2   people who are affected by the combustion PM are  
3   those who already are suffering from an existing  
4   condition like cardiovascular disease, chronic  
5   obstructive pulmonary disease, cancer, asthma or  
6   diabetes, so they're already in a weakened state,  
7   not necessarily mean that they acquire those  
8   diseases as a result of exposure to PM, either  
9   chronically or acutely. But the acute exposure  
10  can severely impact those people in a 24-hour  
11  period.

12         Q     And finally, both Dr. Walthers and Mr.  
13  Willey testified that the plant's operations, up  
14  or down, would not be detectible on ambient  
15  monitors. Do you agree with that?

16         A     Absolutely agree with that. The monitor  
17  technology is simply not there yet. That doesn't  
18  mean that the concentrations, themselves, however,  
19  do not go up and down with the load basis of the  
20  plant. They clearly would.

21           These monitors, I think, will be coming  
22  soon. Unfortunately, the monitoring here in Morro  
23  Bay is not even the most current that's available  
24  currently, the most up to date that's available  
25  currently. The technology here only measures PM

1 on a 24-hour cumulative basis every sixth day.

2 And there would be no way to follow load capacity  
3 or anything else by looking at that measurement.

4 Q I'd like to turn now to rebuttal with  
5 respect to staff. Do you recall Mr. Ziemer's  
6 testimony about one way the ISC modeling was  
7 conservative because it compared existing  
8 operational levels of the current plant to maximum  
9 permitted conditions for the new plant?

10 A Yes.

11 Q And do you agree that this is  
12 conservative?

13 A I disagree. That's precisely what CEQA  
14 requires, a comparison of the baseline actual  
15 conditions, which is, in this case, what the  
16 existing plant had been doing. And you compare it  
17 with what, which is what we're breathing today  
18 here, and you compare that with what you're likely  
19 to be breathing out of the new plant.

20 I don't think that's conservative at  
21 all. I think that's exactly what you have to do.

22 The latter is particularly important in  
23 this case because the plant here is expected to  
24 run up to 90 percent year-round, and sometimes at  
25 100 percent capacity 24 hours a day, seven days a

1 week. And that's according to the AFC.

2 And it's also, if you look at the number  
3 of hours that are being permitted, which refers  
4 back a little bit to the testimony that was  
5 earlier from Mr. Willey and Mr. Rubenstein on the  
6 permitted hour issue, the plant is permitted to  
7 run for 8400 hours out of a total of 8760 hours in  
8 a year. That's 96 percent of the time, if they  
9 want to.

10 So that's absolutely important to be  
11 looking at 100 percent maximum operational load  
12 from this plant compared to what the existing air  
13 quality is here based on the most recent operating  
14 history.

15 I might add, I'd also expect, given the  
16 estimates of the costs that this is going to be,  
17 that to get their return on investment of an \$800  
18 million plant that they will be running that as  
19 much as they possibly can.

20 And it seems to me very unfair to expect  
21 the local residents to absorb any level of  
22 unhealthful air emission effects from that, when,  
23 in fact, Duke could easily be, depending on the  
24 market here, transporting that electricity far  
25 away from California. But we've got the bad air

1 impacts.

2 Q Do you recall Mr. Ringer's testimony in  
3 which he concluded that even if the modeled  
4 concentrations in Morro Bay were accurate, they  
5 would not be significant because of the existing  
6 clean ambient air levels in Morro Bay, and because  
7 of the newly proposed state PM standards?

8 A Yes, I do recall that.

9 Q And do you agree with him?

10 A No. And I think, in part, he may have  
11 been a little bit misled. The new proposed  
12 standards in PM10 would call for the reduction of  
13 the annual mean to 20 mcg/cubic meter from 30.  
14 But it also simultaneously recommends that the new  
15 mean go from the geometric mean, which they use  
16 now, to the arithmetic mean, which is the same as  
17 they use for the federal.

18 If you look at those numbers Morro Bay,  
19 in two of the last four years, has been slightly  
20 above the 20 proposed standard. So that even  
21 without the new plant Morro Bay would not be in  
22 compliance with the newly proposed standards,  
23 should they be adopted.

24 And, again, the reason I said I think he  
25 might have been misled in making his statement

1 earlier was that the numbers that are shown on the  
2 most recent data that -- I believe it was the most  
3 recent data that Duke submitted on this issue in  
4 the exhibit 34, revised table 6.2-37, it appears  
5 that the arithmetic and the geometric mean numbers  
6 have been reversed.

7 I do have a copy of that report that I  
8 mentioned earlier from Bob Carr showing the  
9 current PM levels, which would support this. I,  
10 unfortunately, did not make copies to introduce as  
11 an exhibit, but I'd be happy to make them  
12 available if anybody would like a copy of that.

13 Secondly, the proposed and the existing  
14 standards do not even pretend to set a zero risk  
15 level of protection for exposed residents, which  
16 is what Duke was intimating in its public  
17 promotional materials.

18 By definition, they cannot. Unlike  
19 other pollutants, which do have thresholds of  
20 safety, PM is a different animal. It has no  
21 threshold. And the best they can do is what the  
22 report, the CARB and OEHHA report describe as  
23 operationalizing a threshold, which means they're  
24 picking a number that they think they can get  
25 people to live with, or to strive for until

1 further analyses are done. But it's not a zero  
2 risk level number.

3 That means that adverse health impacts  
4 can absolutely and will occur for increases in  
5 concentrations that are below that level.

6 And, again, as I said, the correct  
7 numbers show that Morro Bay, in fact, will be  
8 right about at, and just slightly exceeding that  
9 standard, as it is.

10 The CARB/OEHHA draft report also  
11 confirms, as does our report on elderly and other  
12 susceptible populations, and the discussion  
13 therein of the absence of the threshold, that  
14 again, that the 1 mcg increase in the PM2.5 that  
15 will be -- which is the annual modeled number  
16 here, and again, I want to emphasize very under-  
17 estimated of actual risk, in our view, very  
18 conservative, that's a 1 mcg, it's going to have  
19 an adverse health impact even though Morro Bay is  
20 lucky enough to be at the lower range in the state  
21 in terms of ambient PM.

22 Mr. Ringer referred to offset of these  
23 emissions, but the ERCs really do go to regional  
24 mitigation and not necessarily to the local  
25 concentrations that stay here in town. And it's



1 the people of Morro Bay in this case that I'm, is  
2 the whole reason that I prepared the reports.  
3 Because no one really is looking out at the local  
4 level.

5 The Air Board is doing their job by  
6 looking at it regionally. And I think their  
7 conclusions in that regard are absolutely correct.  
8 But lower stacks, lesser exhaust velocity and  
9 temperature in the new plant will result in the  
10 local concentration increasing.

11 Q Do you agree with staff that offsets for  
12 increased combustion emissions should come from  
13 combustion-based sources in the mitigation bank?

14 A Absolutely, because that's, as I said  
15 earlier, is where the deadliest particles come  
16 from, combustion.

17 Q Do you agree with Mr. Ringer's view that  
18 if local PM10 concentrations could not increase  
19 there would never be another power plant approved?

20 A No. Definitely not. This is a classic  
21 example right here that we're dealing with in  
22 Morro Bay. This plant could be approved with  
23 additional mitigation by Duke and still leave  
24 Morro Bay no worse off than it is with the  
25 existing plant in terms of air quality.

1 But Duke would have to make it either  
2 somewhat smaller, for example, by eliminating duct  
3 firing, or limiting operational capacities. Or  
4 another way of doing it is obtaining additional  
5 local combustion credits for things that affect  
6 the local air concentrations here, like for  
7 example, obtain credits by doing more cleaner  
8 engines for the entire fishing fleet. There's a  
9 large amount of PM here in local concentrations  
10 comes from that, the fishermen with their older  
11 boats.

12 So there's a whole variety of steps that  
13 could be taken which would bring this plant  
14 emission levels resulting in concentrations here  
15 in town that would be no worse for us. But would  
16 absolutely let them go forward with a brand new  
17 shiny plant.

18 I'm not here to stop that process at  
19 all. I just don't want the air to be worse.

20 Q Do you have any comments on staff's  
21 proposed construction air quality conditions of  
22 certification?

23 A Yes. The AQ, I think it was 3, that  
24 required the temporary monitoring during  
25 construction at the request of the APCD, I

1 absolutely support that, that that occur.

2 And, again, that's partly because the  
3 initial construction emission analysis that was  
4 done by Duke, according to I think it was Mr.  
5 Badr, showed that the concentrations were higher.  
6 It was remodeled and it brought it down. But that  
7 did not -- those modeled construction impacts did  
8 not include the fact that now apparently with  
9 what's occurred in the testimony previously on  
10 other areas that it appeared that the construction  
11 hours are going to go back to 7:00 a.m. to 7:00  
12 p.m., which is five hours longer per day than the  
13 8:00 to 5:00 restrictions, which had originally  
14 been in the FSA.

15 And I don't believe that additional  
16 impact has been modeled. So I think it's crucial  
17 that those temporary monitors remain in the  
18 conditions for the entire construction period.

19 Q And finally, do you have suggested  
20 changes to the proposed air quality conditions of  
21 certification in general relating to mitigation of  
22 adverse air impacts?

23 A Yes, I just need to find them. I  
24 alluded to some of them briefly earlier. I'll  
25 leave the real minor ones to the brief and not

1 bore you with those, but one of the conditions  
2 that talks about the source testing, which goes to  
3 the verification of the emissions.

4 Right now the condition AQ-22 requires  
5 that source test to occur biannually and that it  
6 gets to go down to once every year if the first  
7 several tests come out really clean. I would  
8 propose that it should remain at least the  
9 semiannual event essentially forever.

10 And I guess, I know Hearing Officer Fay  
11 had asked us to be as specific as we could on  
12 recommended mitigation in terms of the condition  
13 we'd like to see, and I've given that a great deal  
14 of thought, and about the best I can come up with  
15 is something along this order. And if I might,  
16 I'll just read it for ease.

17 It would be a proposed new AQ-57. The  
18 project design and implementation --

19 MR. HARRIS: Could we -- I hate to do  
20 this, because you're close to being finished, I  
21 hope.

22 MS. SODERBECK: Yes.

23 MR. HARRIS: If we're talking about a  
24 new condition now, why couldn't this have been  
25 prefilled? Somebody explain that one to me. This

1       isn't a new study that came out yesterday or last  
2       week, or a telephone conversation. This is a  
3       wholly new approach that's being offered orally,  
4       and I'd object on that basis.

5               MS. CHURNEY: Well, actually we were  
6       told that we should file our proposed suggested  
7       revisions with the brief. We're giving you an  
8       advanced view of it. So, --

9               (Parties speaking simultaneously.)

10              HEARING OFFICER FAY: Please, go ahead  
11       and make your comments on the record.

12              MS. SODERBECK: Again, I won't read the  
13       whole thing because it is a little more detailed  
14       than we need to get into right now, but  
15       essentially I'm happy leaving it to Duke to decide  
16       how to come up with the formula that would result  
17       in no increased concentration in --

18              MS. CHURNEY: I'd like the record to  
19       reflect that counsel for Duke just left the room.  
20       I guess he's coming back.

21              HEARING OFFICER FAY: Just please go  
22       ahead with your testimony.

23              MS. SODERBECK: Okay. I would propose  
24       that they submit a plan to the CPM in advance of  
25       actual operations that would set forth mitigation

1       that could consist of, for example, reduction of  
2       the size of the overall 1200 megawatt project,  
3       whether by elimination of duct firing or  
4       otherwise.

5               Substitution of a smaller gas turbine  
6       for peak capacity or load following in lieu of  
7       duct firing, if it has lesser emissions.

8               An increase in the height of the stacks  
9       above 145 feet. And the purchase of additional  
10      direct PM10 local, as yet non-banked, credits.  
11      And, again, this would be for things like credits  
12      from refurbishing the local fishing fleet diesel  
13      engines, that sort of thing.

14              And that, in essence, was as specific as  
15      I thought we should be. I truly do believe that  
16      Duke should have the say-so in deciding the  
17      specifics of how to get there. But I think it can  
18      be -- it's a point that can be gotten to, and  
19      still have a newer, bigger, better plant, but  
20      without the increased PM10 local concentrations.

21              MS. CHURNEY: The witness is available  
22      for cross-examination.

23              HEARING OFFICER FAY: Okay. Let's go  
24      off the record a minute.

25              (Off the record.)

1           MR. HARRIS: I think I've already made  
2 clear my concerns about the unfair surprise here.  
3 One of the collateral damages to that is that it  
4 presents a potential for delay. We're basically  
5 offered a Hobson's choice, we either have to  
6 proceed now with the surprise materials, or we  
7 have to delay the proceeding. And I think it's a  
8 very cunning tactic, but one for which we're not  
9 going to fall victim of. And so, in the equities,  
10 my witnesses are available.

11           I would suggest two things: Number one,  
12 in addition to my cross-examination of CAPE's  
13 witness, I'd like to be allowed to put Mr.  
14 Rubenstein and Mr. Walther on the record for a  
15 short rebuttal of the rebuttal related to the  
16 unfiled documents. That's step one.

17           Step two, after the transcript is  
18 available, make a determination as to whether we  
19 need to ask this witness to come back on these  
20 unfiled materials.

21           My hope would be that if I can have my  
22 witnesses efficiently present their review of  
23 these documents here today, there won't be a need  
24 for CAPE's witness to come back. And Duke will  
25 not suffer the delay associated with these

1 documents not being filed.

2 And so I would propose that as a remedy  
3 for the situation.

4 HEARING OFFICER FAY: All right. And  
5 you're making that offer keeping in mind that  
6 Duke's own limitations today regarding the  
7 availability of their land use witness.

8 MR. HARRIS: Well, I understand our  
9 witness can be available late into the evening if  
10 need be, at some expense and also some terrible --

11 HEARING OFFICER FAY: Okay, --

12 MR. HARRIS: -- but I think it is  
13 important that we not suffer losing one of our  
14 quality witnesses based upon the events today. So  
15 we're willing to proceed until, Mr. Ellison  
16 suggested, we get the close of our direct  
17 testimony on land use on the record.

18 HEARING OFFICER FAY: Okay. Then we  
19 will proceed right now with initially your cross-  
20 examination. We'll ask the other parties to go  
21 through that, and then we'll come back and offer  
22 you a brief rebuttal.

23 MR. HARRIS: Thank you.

24 //



## CROSS-EXAMINATION

BY MR. HARRIS:

Q Good afternoon.

A Good afternoon.

Q You've established earlier that your educational background is a history bachelors, and a law degree.

A Um-hum.

Q You were also an unpaid volunteer for a doctor at UCLA. You don't have any advanced educational degrees in air quality or public health, do you?

A No.

Q You've also established that you are an attorney, but if I remember correctly from your declaration you're not offering legal opinions as part of your testimony, is that correct?

A That's correct. And I've also an inactive Bar status, so I cannot practice law anymore without getting in trouble with the State Bar, anyway.

Q Some people would consider that a virtue, so -- I want to talk about your PM10 studies now, particularly I'm thinking of the discussion about duct burning in paragraph 30 of

1 your prefiled testimony.

2 With regard to those PM10 studies you  
3 made a lot of statements. I want to take a look  
4 at some of your assumptions.

5 And the first one I want to take a look  
6 at is the annual basis. For your analysis did you  
7 use the average, annual average PM10  
8 concentrations modeled throughout Morro Bay's  
9 residential areas?

10 MS. CHURNEY: Are you on paragraph 30 of  
11 her declaration, is that what you said?

12 MR. HARRIS: It grows out of the  
13 disproportionately dirty statement that she said.  
14 She's done modeling.

15 BY MR. HARRIS:

16 Q You've done modeling, have you not?

17 A I have not done any independent  
18 modeling, no.

19 Q An analysis of the modeling?

20 A I have applied my analysis of the  
21 literature to the modeling that was done by Duke.

22 Q Okay. In your application of that  
23 information did you use the average annual average  
24 PM10 concentrations modeled throughout Morro Bay?  
25 Or did you use the maximum annual at any single

1 location as the basis for your analysis?

2 A For annual I used the -- the total I  
3 used in all of these analyses, it might help  
4 shortcut it, I used the annual maximum, excluding  
5 the rock, as though it occurred for every single  
6 day of the year, and looking at the most  
7 conservative case.

8 And I looked at the maximum modeled,  
9 excluding the rock, difference between old and  
10 new, as the high end of the range.

11 So, trying to get a feel between what we  
12 thought was the very lowest estimate of what could  
13 happen, and the cap of what could happen.

14 Q So did you use that number for all  
15 points within Morro Bay?

16 A To the extent that the modeling covered  
17 all points in Morro Bay. I mean I used the number  
18 that showed the maximum high in Gary's modeling,  
19 which I don't believe could possibly be every  
20 single place in Morro Bay, as the high end of the  
21 range. And the annual average, again would have  
22 been the high at whatever the annual average high  
23 location in town was, but I think that's much  
24 closer -- it's less variable from the --

25 Q So within that frame of --

1 A -- high --

2 Q I'm sorry. With the maximum annual  
3 average then you applied that thought Morro Bay,  
4 not just at a single point, is that correct?

5 A I assumed that that was the typical  
6 emission rate for the --

7 Q Throughout Morro Bay?

8 A -- throughout Morro Bay --

9 Q Okay, thank you. I want to go back, you  
10 referenced the Atascadero study and you mentioned  
11 there that there's a higher incidence of asthma  
12 there, but a lower PM10 concentration. Do you  
13 remember your testimony in that regard?

14 A Yeah, it was just sort of an interesting  
15 sidelight to those studies that included that. I  
16 believe that was Garriman, Gillimand, Gilliland,  
17 and McConnell studies that are cited in the  
18 report, all use that same cohort -- I shouldn't  
19 say cohort, the same group of cities that were in  
20 the study, which included Atascadero. And --

21 Q What kind of explanation do you have for  
22 the fact that the incidence of asthma were higher,  
23 but the PM10 concentrations were lower, given the  
24 rest of your testimony on that issue?

25 A Oh, that's why it was just an

1 interesting sidelight. I mean, it doesn't -- it  
2 either can be one of two things. People who have  
3 children with asthma, or who have asthma,  
4 themselves, tend to move to places where they  
5 think the air is cleaner. Or, it's particularly  
6 coincidental.

7 Q Could the study have been wrong?

8 A I don't think so, it's based on health  
9 records.

10 Q Okay, so in your view that study shows a  
11 correlation you would not have expected?

12 A Well, it wasn't a correlation of the  
13 study. I mean the study didn't examine that  
14 particular point. It was just that the Atascadero  
15 population happened to have, of the 15 or so  
16 cities, 10 or 15 cities, that they happened to  
17 have the highest asthma rate, existing asthma  
18 rate, and they also happened to have one of the  
19 lower PM10 rates.

20 Q Okay, I'll try to close this out. So,  
21 factually you're in agreement though, higher  
22 asthma rates, lower concentrations?

23 A Right. That was the case going into the  
24 study.

25 Q Thank you. I want to turn now to Gary

1 Willey's testimony earlier today. He talked about  
2 the plant's contribution to the ambient PM10  
3 levels. And Mr. Willey testified that basically  
4 the plant's contribution to the ambient PM10 would  
5 not be measurable. And he said essentially given  
6 the stuff that's in the air already that you  
7 couldn't measure the existing plant's contribution  
8 to the ambient. And similarly, you wouldn't be  
9 able to measure the new plant's contribution to  
10 the ambient.

11 Did you hear Mr. Willey's testimony on  
12 that issue?

13 A Yes.

14 Q Do you agree with his conclusion?

15 A Absolutely.

16 Q I want to talk a little about duct  
17 burning and the assumptions that you used when you  
18 were looking at this project.

19 In your analysis were you aware that the  
20 Energy Commission found no significant air quality  
21 impacts associated with duct burning when it  
22 approved the Sutter Power Plant project?

23 A No, I don't believe that was one of the  
24 projects I went back and looked at.

25 Q Were you aware that the CEC found no air

1 quality impacts associated with duct burning at  
2 the Los Medanos Energy Center?

3 MS. CHURNEY: Well, I'm going to object  
4 to this line of questioning as irrelevant to what  
5 that testimony was offered for by Ms. Soderbeck.

6 HEARING OFFICER FAY: That's overruled.  
7 This is relevant.

8 BY MR. HARRIS:

9 Q Were you aware in your preparation of  
10 testimony that the CEC found no significant air  
11 quality impacts associated with the Delta Energy  
12 Center project and its duct burning?

13 A I may have looked at some of those  
14 projects, but to me it was not relevant because --

15 Q Excuse me, that's not my question. Were  
16 you aware that the CEC found no significant air  
17 quality impacts associated with duct burning at  
18 the Delta Energy Center facility?

19 A I believe that was one that I probably  
20 had looked at, so I would say yes.

21 Q Were you aware that the Energy  
22 Commission found no significant air quality  
23 impacts associated with duct burning when it  
24 approved the High Desert project?

25 A I don't recall looking at that, no.

1           Q     Were you aware similarly that there were  
2     no air quality impacts associated with duct  
3     burning when they approved the Elk Hills project?

4           A     That one I looked at.  Yes.

5           Q     So you were aware?

6           A     Um-hum.

7           Q     Were you aware that the Commission found  
8     no significant air quality impacts associated with  
9     duct burning when it approved the Mountain View  
10    project?

11          A     I believe I was familiar with that one,  
12    as well.

13          Q     And were you aware of the Midway Sunset  
14    project, which you provided excerpts of today,  
15    were you aware that the Commission again found no  
16    significant air quality impacts associated with  
17    duct burning for that project?

18          A     I should back up and preface all of  
19    these answers by saying I'm not sure that I was  
20    aware that they specifically made an analysis of  
21    duct firing separate from other air quality  
22    impacts.

23                I was aware that they included duct  
24    firing and the projects were approved.  If I can  
25    make that distinction.



1           Q     And that those projects were approved  
2     with a finding of no significant air quality  
3     impacts of any kind, whatsoever?

4           A     Right. I just can't -- I'm not in a  
5     position to say whether they focused on the duct  
6     firing especially.

7           Q     Well, just --

8           A     That's the only point I'm --

9           Q     -- just tapping your logic here, if they  
10    found no significant air quality impacts overall,  
11    is it possible that they found significant air  
12    quality impacts associated with duct burning?

13          A     Probably not. I have to say I don't  
14    know whether they focused on duct firing, is all  
15    I'm saying.

16          Q     Okay. And to speed things along, let me  
17    name four projects for you. The Blythe Energy  
18    project, the Three Mountain Power project, the  
19    Contra Costa/Antioch project, and the Metcalf  
20    Energy Center project, with all of these projects  
21    the Commission found no significant air quality  
22    impacts associated with duct burning.

23                     Were you aware of that in your analysis?

24                     MS. CHURNEY: You know, I object again.

25                     There's been no showing that any of these projects

1 are in any way comparable to this project. That  
2 the duct burner in those projects is the same size  
3 as the duct burner in this project.

4 So, I don't see how this line of  
5 questioning, asking this witness these questions  
6 will aid the Committee in rendering a decision  
7 with respect to this project.

8 HEARING OFFICER FAY: I'll allow that --  
9 sustain that objection, but in the prior examples  
10 the witness had raised those specific cases. So,  
11 sustained.

12 BY MR. HARRIS:

13 Q We'll go ahead and move on. Paragraph  
14 29 of your declaration on page 14, you talk about  
15 optimization of the performance of a turbine. And  
16 specifically you referred to optimization of  
17 equipment performance.

18 Can you give examples of what source  
19 operation -- excuse me, I'll try that again. Can  
20 you give examples of what a source operator can do  
21 with respect to lowering PM10 source test results?

22 A Well, I assume for example that  
23 maintenance could have an impact. Which would go  
24 to the efficiency of the turbine and --

25 Q Could you be specific about the types of

1 maintenance you think might have effect on the  
2 source test for PM10?

3 A I can't be more specific than I had in  
4 mind in writing that, was that for example,  
5 maintenance might be performed on a unit  
6 immediately prior to its being tested.

7 And to the extent that --

8 Q I'm sorry, related to PM10?

9 A Yes.

10 Q PM10 emissions?

11 A I was talking about the PM10, yes. And  
12 that to the extent that over time if they become  
13 dirtier or however you want to describe it in the  
14 natural course of operations, which the whole  
15 reason you have maintenance, that that could  
16 potentially impact the test result, whether you  
17 did that immediately before or after maintenance.

18 Q I'm sorry, what's --

19 A That's all I have in mind.

20 Q -- what's that? You say we do that  
21 before testing, what do --

22 A The maintenance, whether you do the  
23 maintenance before or after testing.

24 Q Okay. Well, here's the quandary I'm  
25 having. You said that somehow you can basically

1 try to optimize this source test for PM10. And my  
2 understanding is you cannot.

3 So, I'm asking you directly, what  
4 maintenance activities are you suggesting could be  
5 used to effect a PM10 source test?

6 A Well, in making that statement my  
7 presumption was that maintenance is performed  
8 because turbines, like any other mechanism, can  
9 become dirty, clogged, whatever, over time.

10 And therefore you do maintenance on them  
11 to make sure that they're back running at 100  
12 percent level.

13 And that if it's maintenance because  
14 they have become less efficient, whether it's  
15 because they're dirtier or whatever might be the  
16 cause of doing the maintenance to start with, that  
17 that could impact the performance.

18 So, you're looking at the test before or  
19 after.

20 Q You're suggesting the machines might be  
21 dirty inside and through maintenance you might  
22 clean them up. And that would --

23 A Yeah.

24 Q -- affect --

25 A Yeah, that's what I had in mind.

1           Q     If whatever you're suggesting is inside  
2     the machine, it's obviously not outside the  
3     machine, so it's not going to be emitted  
4     whatsoever, isn't that correct?

5           A     Not if you're talking about --

6           Q     Well, let me give you a specific  
7     example. You're talking about wiping something  
8     down, cleaning it up by wiping it down.

9                     If it's inside the machine, it's not  
10    escaping to the atmosphere.

11          A     Well, if it --

12          Q     So then how --

13          A     -- makes it work more efficiently you  
14    may then be producing more emissions. I guess was  
15    the only thought I had in mind in that paragraph.  
16    Assuming you're just asking me about that  
17    paragraph.

18                 MR. HARRIS: I have no further  
19    questions.

20                 HEARING OFFICER FAY: Staff?

21                 MS. HOLMES: Thank you.

22                         CROSS-EXAMINATION

23    BY MS. HOLMES:

24           Q     I want to ask a couple of questions to  
25    try to understand what it is you're proposing in

1       that condition of certification since it appears  
2       that the project manager, the compliance project  
3       manager would have some role in this.

4               Is it correct to say that what you're  
5       recommending is that the Commission have, in  
6       essence, a performance standard associated with  
7       the project that would say there could be no  
8       increases in the ambient PM10 concentrations  
9       anywhere as a result of the project?

10       A     In essence, yes. And leaving it up to  
11       Duke, with the CPM, to come up with the parameters  
12       of how that would be reached in terms of the  
13       mechanisms. Whether it's a slightly smaller  
14       plant; whether it's additional credits, local  
15       credits that would account for that additional  
16       concentration.

17              But, again, leaving that discretion as  
18       much as possible to Duke as the expert here.

19       Q     The first set of questions I have to go  
20       to concerns increases over what. What would the  
21       baseline be over which an increase could not  
22       occur?

23       A     I think it's appropriate probably to use  
24       modeling that already exists, since it was -- if  
25       we're looking at an apples-to-apples basis for the

1 modeled results for existing concentrations in  
2 Morro Bay.

3 Q So you're not talking about no increases  
4 over ambient conditions, you're talking about no  
5 increases over the impact, if you will, caused by  
6 the existing project?

7 A Yes.

8 Q And what timeline would you use for that  
9 for the baseline, if you used the existing  
10 project's operation as the baseline, would you use  
11 an average of the last five years? Would you use  
12 an average of the last two years?

13 A I would think it would be appropriate to  
14 use the same average that was looked at in the  
15 FSA, which I think was the '97 to '99, maybe early  
16 2000. It was also the same base period -- I can't  
17 say it was the same base period, that was a two-  
18 year period. Never mind.

19 Q Well, do you recollect the testimony of  
20 Mr. Ziemer with respect to the annual modeling  
21 that he did -- or excuse me, the modeling that he  
22 did for the annual impact of the existing project,  
23 discussing the fact that he came up with an annual  
24 number, but used multiple years of datapoints, had  
25 multiple datapoints for each day in each year? Do

1       you recollect that?

2           A     Oh, absolutely, and I think it should be  
3       several years. I'd be happy with three years.  
4       Whether it's five years, I don't really care  
5       specifically as to what the baseline numbers are.

6           I think it should be a representative  
7       number of at least three years that you're looking  
8       at.

9           I would strongly object if it included  
10      the year 2000, simply because that was such an odd  
11      year.

12          Q     Okay, well, I'm trying to understand  
13      exactly what this baseline is going to be. Is it  
14      going to be you'd like us to do, or Duke to do, or  
15      the District to do some sort of modeling to  
16      determine what the existing project's impacts were  
17      on an annual basis for the year '98, '99 and 2001?

18          A     I think you can use -- maybe in my mind  
19      I'm just being too simpleton-ish here, but what I  
20      was thinking of was you have the existing model  
21      results which were based on the emissions levels  
22      from the plant operations which I think were '97  
23      through '99.

24           You have that already in the model. It  
25      gives you a number. And with whatever Duke wants



1 to do to change the new plant, -- at the max  
2 levels of what would be proposed, for example,  
3 without duct firing, plug it in the model and it  
4 shouldn't be any more than the old plant in terms  
5 of the results here in town.

6 Q And are you talking about an annual  
7 average or a 24-hour?

8 A I think it would be difficult to do the  
9 24-hour one because of the significant changes in  
10 the configuration of the old and new plants, with  
11 the taller stacks and the lower stacks.

12 I think that would probably cause too  
13 much variation to try and pinpoint it that closely  
14 to a 24-hour max. I think we would be happy if  
15 annually, we didn't have any more as an annual  
16 average than we have now.

17 Q And when you are trying to determine  
18 this annual baseline are you looking at which one  
19 of the many, I think they're referred to as  
20 datapoints. In other words, the modeled results  
21 for the annual increases within the City of Morro  
22 Bay, the model produces a great number of results.

23 Which ones are you looking at?

24 A I would be happy with the max.

25 Q The max of the entire town, even though

1 the maximum doesn't occur in all parts of the  
2 town?

3 A Right. If that maximum, wherever it  
4 occurs, is no higher than the maximum that would  
5 occur with the new plant, wherever it might occur,  
6 and I fully recognize it's probably a different  
7 location because of the different configuration,  
8 that I think that's as close as realistically you  
9 could get to try and keep the local concentrations  
10 no worse than they are.

11 I recognize it's not an easy thing to  
12 put in practice. But conceptually I think it's  
13 exactly what CEQA would call for.

14 Q So you would look for the modeled annual  
15 PM10 emissions from the existing project, and look  
16 at the maximum impact and say that the new  
17 project, on an annual basis, could not have any  
18 higher impacts than that?

19 A Exactly.

20 Q Thank you. You're averse to including  
21 the year 2001 in your baseline?

22 A I guess I haven't done any detailed  
23 analysis to see when the sort of crisis period  
24 ended. I assume that excluding 2000 is enough.

25 Q So, in other words if -- let's suppose

1 staff or Duke were to conduct this analysis and we  
2 looked at '98, '99 and 2001 and tracked the  
3 maximum numbers that were to be shown indicated  
4 that, in fact, the proposed project would have a  
5 decrease. You wouldn't have any recommendations  
6 for an additional condition of certification?

7 A Yeah, I mean if you looked at the data  
8 and it showed that there would be no significant  
9 local concentration increase from the existing  
10 plant to the new proposed plant, then I'm  
11 satisfied. That's all you can ask for under CEQA.

12 I guess I'm being -- the issue I have  
13 mind that concerns me in using those most recent  
14 years, though, even if you take aside the 2000,  
15 which was beyond anybody's control, that you  
16 normally wouldn't look at baselines after the  
17 project proposal has been filed by the applicant,  
18 because they control what happens then.

19 So I'm not sure that for that reason  
20 2001 would be the best year, but I mean  
21 conceptually, if you're asking if you get to the  
22 point where the concentrations are no higher than  
23 they are right today, I think that's all we can  
24 ask of you.

25 Q And you're recommending that the

1 Commission ignore, if I understand your testimony  
2 correctly, ignore any benefit that's attributable  
3 to the emission reduction credits that don't come  
4 from the shutdown of the plant as it's currently  
5 operating?

6 A I don't think they ignore them at all.  
7 I think the responsibility is to look both  
8 regionally and locally. And I think regionally  
9 there is a net benefit, which is definitely to the  
10 good.

11 I don't think that cancels out, if you  
12 will, the net adverse effects to the local  
13 community. I think you have to look at both of  
14 those. So I'm not suggesting they ignore them.

15 Q Is it your testimony that if duct firing  
16 were omitted there wouldn't be any increases  
17 anywhere in the City of Morro Bay?

18 A No, I don't know that because I'm not a  
19 modeling expert, and I would have no idea exactly  
20 how that would impact the calculation. I know Mr.  
21 Rubenstein testified about what he thought that  
22 impact would be in terms of lowering the  
23 increases.

24 As I recall he said it would be about 5  
25 percent lower.

1           Q     And similarly is it your testimony that  
2     if there was to be local combustion credits  
3     created through replacement of diesel engines, for  
4     example, that there would, as a result, be no  
5     increases in Morro Bay?

6           A     I think they would certainly be feasible  
7     in my mind that there would be enough credits for  
8     them to obtain, that in effect you would subtract  
9     those back out of the model because those are now  
10    gone. And you might come -- at that point you'd  
11    be able to come to a net net no change.

12                The fishing fleet was just an obvious  
13    example to those of us who live here.

14          Q     Let me see if I can get to maybe a  
15    summary question. Is it your testimony hat the  
16    Commission shouldn't license a project unless  
17    there are no concentrations at anytime or anyplace  
18    on an annual basis over the existing background?

19          A     I think that depends entirely on the  
20    pollutant. Let's limit it to PM10. With PM10,  
21    because of the absence of a threshold, I think is  
22    much different than any other, whether you're  
23    talking about another pollutant or there are other  
24    health impacts to noise and other things, but  
25    presumably when you're talking about the air, and

1       it's a clearly demonstrated adverse effect, which  
2       in this case in particular when you're talking  
3       about a plant that they don't know whether it's  
4       going to be 30 years or 100 years --

5           Q     I just want an answer to the question  
6       about what the licensing criteria are.

7           A     I don't know that you can say the  
8       criteria should be the same in every case. I'm  
9       saying we look at this example, the significant  
10      adverse effects, and yes, certainly the Committee  
11      should require that to be fully mitigated.

12          Q     And you believe that the basis for the  
13      showing that the plant is fully mitigated is  
14      through the use of modeling similar to what was  
15      performed in this case?

16          A     I'm not wed to that idea, but I'd be  
17      open to, you know, proposed with a mechanism to  
18      determine that. Modeling is generally how it's  
19      done, I think, in terms of looking at what the  
20      local concentrations are and what they will be,  
21      for example, that was done here from the existing  
22      project to the new project.

23          Q     Again, since you're recommending a  
24      condition of certification that staff has to  
25      implement, --

1           A     Sure, I --

2           Q     -- you can understand why I have  
3     questions about how it's going to, in fact, work?

4           A     Sure, and I'm putting it out in a  
5     gesture of trying to come up with something, what  
6     Hearing Officer Fay suggested, to be a little more  
7     specific on what we thought we would like to see.

8           Q     Well, then, maybe I can just state it  
9     more broadly.  It's your testimony that the  
10    Commission shouldn't license the project unless  
11    there's a mechanism for insuring that there are no  
12    PM10 increases anywhere on an annual basis  
13    compared to the ambient air quality, the ambient  
14    levels?

15          A     To be absolutely protective of health,  
16    yes.

17          Q     You referenced, I don't have the exhibit  
18    right in front of me, the draft ARB/OEHHA  
19    document, I believe it's exhibit 182, and you  
20    referred to the fact that the report uses some of  
21    the studies that you referenced in your testimony,  
22    as well.

23                   Does that report recommend a change in  
24    the method of permitting large stationary sources,  
25    or does it just recommend a change in the ambient

1 air quality standards?

2 A It's whole purpose is to evaluate the  
3 health impacts in terms of whether the state  
4 standards should be tightened, so it does not look  
5 at any particular source.

6 Q Well, does it recommend that -- does it  
7 make a recommendation that regulatory agencies,  
8 such as the Energy Commission, make a change in  
9 the method by which they permit large stationary  
10 sources?

11 A I don't think it went to that point, no.

12 Q Thank you.

13 MR. HARRIS: Counsel, I don't know that  
14 we have that document you reference. You  
15 referenced an exhibit number which is 182, which  
16 is not, I don't believe --

17 MS. HOLMES: Did I get the exhibits  
18 wrong?

19 MS. CHURNEY: No, it is not an exhibit.  
20 It was referenced, I believe -- I believe what  
21 Caryn meant was that it was referenced in that  
22 Levy Spengler report.

23 MS. HOLMES: No, no, no, I'm sorry, I'm  
24 referring to the --

25 (Parties speaking simultaneously.)



1 HEARING OFFICER FAY: -- California  
2 ambient air quality standards for particulate  
3 matter and sulfates, report to the Air Quality  
4 Advisory Committee. It's a document that was  
5 referred to by staff's testimony and it was  
6 referred to --

7 MR. HARRIS: Yeah, why don't we just  
8 mark it and move it in. I just wanted to have the  
9 record -- why don't we give it a number and have  
10 it in. I don't have any problem with it coming  
11 in, I just think we ought to be clear what it is.

12 MS. CHURNEY: We have no problem with  
13 that.

14 HEARING OFFICER FAY: Ms. Holmes, since  
15 you posed the question, can you identify the  
16 exhibit?

17 MS. HOLMES: It's entitled, review of  
18 the California ambient air quality standards for  
19 particulate matter on sulfates, report to the Air  
20 Quality Advisory Committee, public review draft  
21 November 30, 2001.

22 I would just note that each page says:  
23 Do not cite or quote.

24 (Laughter.)

25 HEARING OFFICER FAY: That's exhibit

1 184.

2 MS. SODERBECK: But it is posted on  
3 their webpage for the world to see.

4 HEARING OFFICER FAY: Any further  
5 questions, Ms. Holmes?

6 MS. HOLMES: I believe I'm done, thank  
7 you.

8 HEARING OFFICER FAY: All right, does  
9 the City have any questions?

10 MR. ELIE: No questions.

11 HEARING OFFICER FAY: Okay. Any  
12 redirect, Ms. Churney?

13 MS. CHURNEY: Could I just have a moment  
14 with my witness?

15 HEARING OFFICER FAY: Sure.

16 (Pause.)

17 MS. CHURNEY: I have no further  
18 redirect.

19 HEARING OFFICER FAY: I'm sorry, could  
20 you repeat that?

21 MS. CHURNEY: No redirect.

22 HEARING OFFICER FAY: No redirect.

23 MS. CHURNEY: -- rebuttal --

24 HEARING OFFICER FAY: All right. Mr.  
25 Harris, I promised you rebuttal. Would you like

1 to go ahead with that now?

2 MR. HARRIS: I would, and I think we'll  
3 try to keep it simply by going through the  
4 exhibits, we'll refer to the exhibit numbers; we  
5 may actually take them a bit out of order. We're  
6 going to start with exhibit 178.

7 Mr. Rubenstein and Dr. Walther have been  
8 previously sworn, too, so I'm going to go ahead  
9 and launch right into it, if we can.

10 DIRECT EXAMINATION

11 BY MR. HARRIS:

12 Q Mr. Rubenstein, I want to turn your  
13 attention to exhibit 178, which is the GE paper  
14 that's previously identified.

15 Can you summarize your rebuttal  
16 testimony on that issue for us, please.

17 MR. RUBENSTEIN: Yes. This is the paper  
18 that is entitled, investigation of artifacts and  
19 condensible particulate measurements for  
20 stationary combustion sources. It was authored by  
21 Stephanie Wien of GE Energy and Environmental  
22 Research Corporation and others.

23 The paper actually is quite consistent  
24 with my testimony. At the bottom of page 1 is a  
25 discussion of the formation of artifact sulfate

1 during impinger-based particulate measurement  
2 techniques, such as methods 202 and method 8 that  
3 you've heard discussions about today.

4 And the paper goes on to say, quote,  
5 "based on these observations results obtained  
6 using a dilution tunnel appear to be more  
7 representative of actual primary particulate  
8 emissions from these sources."

9 If you actually read through the paper I  
10 believe it does not support CAPE's position.  
11 Rather it supports the position that the kinds of  
12 methods that are used to measure particulate  
13 emissions from gas turbines do, in fact, overstate  
14 those emissions.

15 MR. HARRIS: Thank you. Let's go next  
16 to exhibit 181, which is the PM2.5 PowerPoint  
17 presentation. Could you summarize your testimony  
18 there, please.

19 MR. RUBENSTEIN: Yes. This is the  
20 PowerPoint presentation that was presented by Glen  
21 England of GE ERC -- excuse me, GE EER at the same  
22 AW conference that was discussed earlier.

23 Ms. Soderbeck referred to a graph in the  
24 back, and I apologize because these are all un-  
25 numbered tables, but I believe she was referring

1 to one that referred to PM2.5 mass from a gas-  
2 fired process heater. I'm not sure how else to  
3 describe it.

4 In any event, she was referring to run  
5 number 2 as being -- if it would help, yeah, we  
6 could put a copy of this up on the display.

7 HEARING OFFICER FAY: Just for purposes  
8 of identification, as I number those pages, that  
9 comes out to page 14.

10 MR. RUBENSTEIN: Yes, it's the 14th page  
11 in my copy, as well.

12 Ms. Soderbeck was referring to run  
13 number two as being somehow typical or an example  
14 of a particulate run. If you actually attended  
15 the presentation you would have heard that run  
16 number two was an example presented by Glen  
17 England of how not to do a particulate test  
18 because of the substantial artifact formation.

19 As you see from the chart, it refers to  
20 no-purge. What Mr. England was referring to is  
21 the fact that during that method, method 202 was  
22 used to measure the condensible particulates, but  
23 without a one-hour nitrogen purge of the gases  
24 contained in the impingers.

25 Mr. England believes that it's critical

1 to do that purge in order to reduce the formation  
2 of artifact sulfates. And if you look further to  
3 the right on that chart, I believe run number  
4 three and run number one, those include the purge.  
5 And you can see the dramatic effect of measuring  
6 particulate emissions from the same source under  
7 the same operating conditions where all you're  
8 doing is eliminating the formation of artifact  
9 particulates.

10 If you further take a look at runs one,  
11 two and three, under the heading dilution tunnel  
12 method, what you see is that the numbers, the  
13 particulate measurements are much much lower from  
14 that method. And that is the method that GE EER  
15 recommends, both in the PowerPoint presentation,  
16 exhibit 181, and in the paper, exhibit 178.

17 Since we've been talking about documents  
18 labeled preliminary, do not quote or cite, I've  
19 been hesitant to do this. And I mentioned this  
20 briefly during my testimony, but there's been so  
21 much disinformation presented on the subject today  
22 that I feel compelled to discuss it.

23 The California Energy Commission has  
24 been co-sponsoring, with other agencies,  
25 development of new test methods for particulates

1 from gas-fired gas turbines. The work is being  
2 done by GE EER. These papers are, in fact, a part  
3 of that overall research.

4 These papers did not discuss the results  
5 of testing performed on gas turbines because none  
6 had been done at the time the papers were  
7 prepared.

8 Testing has been done at the Crockett  
9 Cogeneration facility in northern California. The  
10 testing was done by GE EER under the auspices of  
11 this project that, again, is cosponsored by the  
12 Energy Commission.

13 And the preliminary data, which are  
14 marked --

15 MS. CHURNEY: Well, I'll object to this  
16 testimony if it's not been published. And we  
17 don't have it here to review. I'll object --

18 MR. HARRIS: Just as long as the same  
19 rules apply as applied with Mr. Hartman, we're  
20 fine with that.

21 HEARING OFFICER FAY: We'll note your  
22 objection. I'm afraid you've done this to the  
23 applicant several times already.

24 MS. CHURNEY: Well, actually it turned  
25 out that the paper that Mr. Hartman referred to

1 had been published at the time he spoke of it.

2 MR. HARRIS: It wasn't prefiled and we  
3 didn't know that.

4 MS. CHURNEY: Well, this hasn't even  
5 been published.

6 HEARING OFFICER FAY: Well, we'll take  
7 that into account and let that go to the weight.

8 Mr. Rubenstein, do you want to continue?

9 MR. RUBENSTEIN: I would agree that --  
10 yes, I will. I would agree that this should be  
11 evaluated very carefully in the sense that it has  
12 not been published, and it has not been peer-  
13 reviewed, and I'd urge the Committee to take that  
14 into account.

15 However, the results are quite striking.  
16 The results of the dilution tunnel test, which is  
17 the new test method that GE EER is developing,  
18 indicated that particulate emissions from this  
19 turbine, which is a General Electric 7 FA turbine  
20 like this one, including an oxidation catalyst and  
21 selective catalytic reduction like this turbine,  
22 the measured PM2.5 emissions during those  
23 preliminary tests were well under one pound per  
24 hour. Not under 10, not under 20, but under one  
25 pound per hour.



1           And what that goes to is the issue of  
2       whether of the permit levels that are being  
3       proposed here are conservative during the same  
4       testing program GE EER used the methods that I  
5       have recommended, methods 201A and method 8, and  
6       came up with total particulate levels using those  
7       methods of about 5 pounds an hour, which is  
8       consistent with my testimony.

9           All of that, I believe, goes to support  
10      our position and refute CAPE's position that  
11      particulate emissions from these turbines are  
12      substantially understated. In fact, I think they  
13      are substantially overstated.

14           MR. HARRIS: Thank you, let's move on.  
15      Are we ready to move on to the next exhibit?  
16      Let's move to 179, that's the AFC compendium.  
17      This document is familiar to both you and I as  
18      we've seen it in other proceedings. Can you  
19      summarize your testimony on that document, please.

20           MR. RUBENSTEIN: Yes. These are pages  
21      presented by permit applicants to the Energy  
22      Commission. They are standard. They appear to me  
23      to be standard General Electric performance runs.  
24      And reflect standard General Electric commercial  
25      guarantees for particulates from gas-fired gas

1 turbines.

2 As had been indicated earlier, I did not  
3 rely on numbers like these, although I have seen  
4 sheets like this before. When Ms. Soderbeck was  
5 discussing this exhibit, she also made reference  
6 to particulate levels for the Sutter Power  
7 project, and I just wanted to correct those  
8 numbers.

9 The emission limits for the Sutter Power  
10 project are nine pounds per hour for the turbine  
11 when it is unfired, and I believe it is 11.5  
12 pounds per hour with duct firing.

13 So, generally the same order of  
14 magnitude of these numbers, and not substantially  
15 higher as Ms. Soderbeck had indicated.

16 MR. HARRIS: And you worked on that  
17 project personally, so you have confidence you  
18 know those numbers to be correct, is that true?

19 MR. RUBENSTEIN: Yes.

20 MR. HARRIS: I want to get you to focus  
21 a little bit on the issue of vendor guarantees  
22 versus the idea of emissions limits, because those  
23 are two different things.

24 Can you, based on your professional  
25 expertise, kind of help us understand that

1 important distinction, please.

2 MR. RUBENSTEIN: Vendor guarantees are  
3 typically not provided to the developer until  
4 after the project is licensed and final  
5 engineering is underway.

6 There are some occasions where there may  
7 be vendor guarantees available before then, but  
8 vendor guarantees are, in fact, commercial  
9 agreements between the purchaser and the seller of  
10 equipment.

11 In most cases the commercial guarantees  
12 include emission rates that one can reasonably  
13 rely upon. However, that's not consistently the  
14 case. And with respect to particulate emissions  
15 from gas-fired gas turbines, in my professional  
16 experience, that is certainly not the case.

17 The guarantees issued by vendors take  
18 into account the fact that there is a wide range  
19 of inexperience in measuring particulate emissions  
20 from gas turbines throughout the country. And the  
21 vendors are looking to limit their financial  
22 exposure associated with not meeting a performance  
23 guarantee.

24 Consequently, as indicated in the paper  
25 that I presented last year, and has been

1 introduced as an exhibit by CAPE, there's a  
2 tremendous amount of variability in the source  
3 test results. That variability gets factored into  
4 a vendor's calculation of what a guarantee level  
5 should be. It might be the mean reported value  
6 plus three standard deviations. It might be the  
7 mean plus six standard deviations, depending on  
8 the level of comfort they want.

9 But that is why the vendor guarantees  
10 are so high, is because there's so much  
11 variability in the testing methods.

12 MR. HARRIS: So those vendor guarantees,  
13 then, reflect a commercial arrangement, a sharing  
14 of risk, is that correct?

15 MR. RUBENSTEIN: That's correct.

16 MR. HARRIS: So we'll move on to exhibit  
17 180.

18 MR. RUBENSTEIN: Actually, I think my  
19 discussion just now also covers exhibit 180.

20 MR. HARRIS: Okay, well, then let's move  
21 to exhibit 182, which is the Levy and Spengler  
22 study that Dr. Hartman had talked about.

23 MR. RUBENSTEIN: Ms. Soderbeck, in her  
24 testimony, described this study as using quote,  
25 "precisely the methodology used here" unquote.

1 That is simply not the case.

2 The Levy and Spengler study looked at  
3 emissions from not one plant, but from two plants.  
4 They were two coal-fired power plants located in  
5 Massachusetts.

6 The total sulfur dioxide emissions from  
7 those two plants was 76,000 tons per year. As  
8 compared with the sulfur dioxide emissions from  
9 the proposed Morro Bay project of 23. That's  
10 76,000 tons compared to 23 tons of sulfur dioxide.

11 The combined NOx emissions from these  
12 two plants was over 20,000 tons per year as  
13 compared with 292 tons per year from this plant.

14 So with respect to the magnitude of  
15 emissions they're not at all comparable.

16 I'd point out that the study did not  
17 look at PM10 emissions from these two coal-fired  
18 power plants. They only looked at NOx and SOx and  
19 presumed a relationship to particulates, which I  
20 think is a reasonable presumption. But I just  
21 want to be clear, did not look at particulate  
22 emissions. And that's another distinction between  
23 the methodology that CAPE has used and this study.

24 MS. CHURNEY: Well, I think you are  
25 mischaracterizing Ms. Soderbeck's testimony in

1       that regard.

2               MR. RUBENSTEIN: I wrote the quote down,  
3       but we can look at the transcript later.

4               MR. HARRIS: Let me, on that point, the  
5       assumption that you talked about there that NOx  
6       and SO translate into PM10 benefits, is that an  
7       assumption that CAPE has disputed in other forums?

8               MR. RUBENSTEIN: Actually I've seen CAPE  
9       indicate both that it is a precursor and it's  
10      appropriate; and also disagree with its use,  
11      depending on the issue.

12              In addition, the Levy and Spengler study  
13      looked at a geographic area that is 600 kilometers  
14      by 600 kilometers in size, covering a population  
15      of 33 million people in the northeast United  
16      States. By contrast, CAPE's analysis was based on  
17      the maximum concentration at a single point.

18              Spengler and Levy study took a look at  
19      the average population-weighted annual  
20      concentration across this 600 by 600 kilometer  
21      area in doing their analysis. And as you might  
22      imagine, that is, even for these large emission  
23      rates, a very low concentration. In contrast,  
24      CAPE used a single number representing the maximum  
25      concentration at the maximum point, excluding

1 Morro Rock.

2 For all of these reasons there is  
3 absolutely no comparability between the  
4 methodologies and if you were to apply the actual  
5 methodology that Levy and Spengler used to this  
6 project, first of all I'm not sure it would be  
7 appropriate, because we're looking at too small of  
8 a geographic area. But you would certainly get  
9 substantially different results, and I mean by  
10 several orders of magnitude different than the  
11 analyses that have been provided by CAPE.

12 MR. HARRIS: Let's move on to exhibit  
13 183.

14 MR. RUBENSTEIN: Finally, exhibit 183 is  
15 the study by Pope, et al, that's been in the  
16 newspapers very recently. What's important to  
17 note there is that for the first time that I've  
18 seen, they have actually correlated and admit to  
19 correlating the health effects that they see  
20 associated with PM10 levels to be associated with  
21 sulfur dioxide, in particular sulfate emissions.

22 And to get to what it was that they were  
23 focusing on there was an Associated Press story  
24 that came out along with the release of this  
25 study, and in it Dr. Thurston was quoted as saying

1       that the study gives new impetus to efforts in  
2       Washington to clean up aging coal-fired power  
3       plants.

4               And I think that's exactly right.  
5       Because this study showed that there was a  
6       significant correlation between sulfate levels and  
7       the health effects that they associated with  
8       particulates. They can't distinguish very well  
9       between the two.

10              And clearly from the newspaper accounts,  
11       the authors are focusing on both sulfur dioxide  
12       emissions and metals from coal-fired power plants.  
13       Those emissions are either nonexistent or are  
14       trivial associated with this project.

15              MR. HARRIS: Thank you. I'd like to  
16       turn now to Dr. Walther briefly, and I think we  
17       want to focus, Eric, on exhibit 182, which is  
18       again the study. Can you please summarize your  
19       rebuttal testimony on that for us, please.

20              DR. WALTHER: Exhibit 182 again is the  
21       study by Levy and Spengler. And one can see  
22       quickly in their introduction that they meant the  
23       real power of the study to be applied to state  
24       planning for all sorts of control strategies. It  
25       could be any state of the Union.



1           When they took those two particular coal  
2   plants, Gary's already noted the differences in  
3   emissions compared to the proposed project, which  
4   turns out on the SOx part of it, since they did  
5   not have PM10 numbers, a ratio of 3000.

6           The inapplicability of --

7           MR. HARRIS: Excuse me, Eric, the 3000  
8   meaning that the --

9           DR. WALTHER: The ratio of emissions of  
10   the actual two coal-fired power plants in  
11   Massachusetts versus the proposed project.

12          MR. HARRIS: So the New England projects  
13   had basically 3000 times as much, is that what  
14   you're saying?

15          DR. WALTHER: Yes.

16          MR. HARRIS: Okay, thank you.

17          DR. WALTHER: Which is very important,  
18   because many of these studies, since I know  
19   Professor Spengler very well, since we went  
20   through the same graduate program together for  
21   both MS and PhD, he's been a leader of many of the  
22   studies. So everything I'm saying goes more not  
23   just to this particular paper, but a whole series  
24   of studies done by the epidemiological community  
25   of which he's been a leader now for at least 20

1 years.

2 The work that they're doing again is  
3 applied at the macro level of planning, or for, in  
4 this case, very large power plant projects.

5 In this same paper, not only do they  
6 note the importance in that general planning  
7 context of their work, but they have a special  
8 table, too, to make the reader aware of the  
9 shortcomings of their work. And it's the  
10 shortcomings where the real key distinction is  
11 between the proposed gas-fired turbines of the  
12 Morro Bay project versus other emissions, either  
13 of two very large coal-fired power plants, which  
14 have many metals in the PM10, or in general  
15 community studies, which is what most of the  
16 epidemiological communities worked on, as I said  
17 in my main testimony.

18 They note that they cannot support the  
19 concept or assumption that they use for  
20 convenience of equal toxicity for very good  
21 reasons, because it is so different to look at the  
22 particles that come from the specific natural gas  
23 powered plant proposed here, and the particles  
24 that are available from either those two very  
25 large coal-fired power plants, or from any of the

1 communities in of the epidemiological studies.

2 Because these communities have exactly  
3 what you'd expect, they have everything in them.  
4 They have diesel vehicles, they have all sorts of  
5 industry, they have just automobile emissions. If  
6 you look, as I said before, at San Luis Obispo  
7 County power plants, perhaps specifically the  
8 Morro Bay Power Plant, is only .4 percent of the  
9 entire PM10 inventory.

10 All these other sources are 99.6  
11 percent, which is why the studies are applicable  
12 to general community concerns, general community  
13 planning, all the way up to national planning.  
14 But not to a specific project.

15 MR. HARRIS: And, Dr. Walther, would  
16 that explain Gary Willey's testimony as to why he  
17 wouldn't be able to detect the power plant  
18 operating in the background?

19 DR. WALTHER: Even moreso because when  
20 the modeling is looked at, as Gary has noted the  
21 over-estimation, I'm not going to use the word  
22 conservative because it can be interpreted both  
23 ways depending upon what your political position  
24 is, but anyway the over-estimates that Gary has  
25 talked about, and the entire scientific literature

1 support when it comes to the nature of modeling,  
2 like with ISC3, those over-estimates show that if  
3 you were to look properly at the project emissions  
4 versus what's in Morro Bay to begin with, because  
5 what's in Morro Bay to begin with you can see the  
6 data, it was in the AFC, total community maybe 20,  
7 30 micrograms per cubic meter on annual basis.  
8 Highest maximum 24-hour might be 40, 30, I'm just  
9 giving you a general sense of the values.

10 When Gary and I have to do the modeling  
11 and look at the entire community versus the  
12 protocol that we have to report on, which gives  
13 the maximum, you'll find that the average annual  
14 concentration is .1. You'll find that the average  
15 24-hour value is closer to .5.

16 And this is simply a weighted mean going  
17 through the center of the community where these  
18 folks live, not on a mountaintop which the  
19 protocol forces us to do. If the highest  
20 concentration is on Black Hill or something like  
21 that, that's where it gets reported. If nobody  
22 lives up there, that has nothing to do with the  
23 protocol. We have to report where the people are  
24 going to potentially find a maximum, not where  
25 they're living.

1           So, the point is if these concentrations  
2   now are then even used with epidemiological  
3   concentration functions, which they shouldn't be,  
4   but if they were, you're going to get effects that  
5   are nowhere near what has been published by the  
6   intervenors. What you'll get is one-hundredth of  
7   1 percent of mortality, because in the same Levy  
8   and Spengler study they were careful to note that  
9   they used basically a .5 percent per microgram per  
10  cubic meter.

11           The cohort studies, which I agree with  
12  Ms. Soderbeck, are very important because of the  
13  way they follow individuals, can account for all  
14  sorts of gender, sex, age factors, et cetera, it  
15  only found .1 percent of mortality increase for  
16  every microgram per cubic meter. Again, multiply  
17  that by .1 for the project and you get a hundredth  
18  of 1 percent.

19           So what's happened here is that general  
20  valuable epidemiological studies for the nation  
21  had been mis-applied, as I said before, to this  
22  specific project. And, in fact, completely thwart  
23  the purpose of the CEC process, which is to ask,  
24  under CEQA, does this project have a significant  
25  or insignificant impact.

1           And all the numbers, as you can quickly  
2       see by the magnitudes that Gary and I are trying  
3       to bring out, are all below a level of  
4       significance. They're all insignificant. You can  
5       argue about the numbers, but they're in the  
6       insignificant zone.

7           MR. HARRIS: So we're talking about  
8       degrees of insignificance basically?

9           DR. WALTHER: Exactly.

10          MR. HARRIS: Thank you. I want to go  
11       back to Mr. Rubenstein for one quick point and  
12       then I think we'll probably be there.

13          Gary, you want to go back to, I think  
14       it's exhibit 181, is that correct? Actually I  
15       wanted to go back through this question we had  
16       about geometric versus arithmetic tables. Could  
17       you clarify that testimony, please.

18          MR. RUBENSTEIN: Yes. There was some  
19       discussion earlier about the difference between  
20       annual arithmetic mean and annual geometric mean  
21       calculations of annual PM10. I just wanted to  
22       clarify that is not something we model.

23          MS. CHURNEY: Excuse me, I don't think  
24       this testimony came up with respect to one of the  
25       rebuttal exhibits that was introduced today, so I

1 would object to introduction of this additional  
2 testimony.

3 HEARING OFFICER FAY: Are you addressing  
4 something --

5 MR. HARRIS: I think it is relevant.

6 HEARING OFFICER FAY: -- specific?

7 MR. HARRIS: I think it is relevant to  
8 the studies that we've put forth.

9 HEARING OFFICER FAY: Could you tie it  
10 in before you move forward?

11 MR. HARRIS: All right, we'll let it go.

12 HEARING OFFICER FAY: Okay. Anything  
13 further?

14 MR. HARRIS: No. Well, let me check  
15 quickly.

16 (Pause.)

17 MR. HARRIS: I think we're done.

18 HEARING OFFICER FAY: Okay, -- available  
19 for cross-examination on rebuttal?

20 MR. HARRIS: Yes.

21 HEARING OFFICER FAY: Ms. Holmes?

22 MS. HOLMES: No.

23 HEARING OFFICER FAY: The City?

24 MR. ELIE: No.

25 HEARING OFFICER FAY: CAPE?

1 MS. CHURNEY: Yes.

2 CROSS-EXAMINATION

3 BY MS. CHURNEY:

4 Q Going back to your testimony, Mr.  
5 Rubenstein, regarding the vendor guarantees and  
6 your testimony that it's a commercial arrangement,  
7 a sharing of the risk that's negotiated.

8 Isn't it correct that the reason these  
9 vendor guarantees are as high as they are, one of  
10 the reasons is that the vendors were getting sued  
11 all the time after these turbines went in? And to  
12 protect themselves and their risks, they increased  
13 the guarantees on the turbines?

14 MR. HARRIS: I'm going to object on the  
15 basis that that was not his testimony. You've  
16 introduced a new element about lawsuits. He did  
17 not testify as to those.

18 MS. CHURNEY: No, but he talked about  
19 the vendor guarantees. I'm simply asking him, as  
20 an expert, what his knowledge is.

21 HEARING OFFICER FAY: I'm going to allow  
22 that.

23 MR. RUBENSTEIN: I'm not aware of any  
24 lawsuits.

25 MS. CHURNEY: Isn't the higher guarantee



1 numbers a conservative approach, would you agree  
2 that the vendors, in an abundance of caution, are  
3 protecting themselves in their negotiations -- in  
4 the negotiated rates?

5 MR. HARRIS: Can you clarify, a  
6 conservative approach as to that commercial  
7 arrangement, or as to a regulatory?

8 MS. CHURNEY: Commercial with respect  
9 to, yeah, with respect to the commercial  
10 arrangement, yes.

11 MR. RUBENSTEIN: Is the premise of your  
12 question that all of the guaranteed numbers are  
13 higher?

14 MS. CHURNEY: No.

15 MR. RUBENSTEIN: You're saying if there  
16 is a guarantee number that is a higher number --

17 MS. CHURNEY: Correct.

18 MR. RUBENSTEIN: -- is that conservative  
19 in terms of protecting --

20 MS. CHURNEY: Do you agree?

21 MR. RUBENSTEIN: -- the vendor's risk?

22 MS. CHURNEY: That's right.

23 MR. RUBENSTEIN: Yes, if the guarantee  
24 is higher.

25 MS. CHURNEY: And isn't it a goal of air

1 quality measurement and air quality protection,  
2 for that matter, to be conservative in setting the  
3 limits of air pollution?

4 MR. RUBENSTEIN: It is not a goal of air  
5 quality analysis to be conservative with respect  
6 to a vendor's risk. It's got nothing to do with a  
7 vendor's risk.

8 MS. CHURNEY: No, no, conservative with  
9 respect to public health risks --

10 MR. RUBENSTEIN: I'm sorry, you are  
11 using the same term in two different ways.

12 MS. CHURNEY: Right, but it is the same  
13 term in each case. I mean isn't it a goal, from a  
14 public health perspective, to be conservative in  
15 protecting the public health?

16 MR. RUBENSTEIN: Yes.

17 MS. CHURNEY: I have no further  
18 questions.

19 HEARING OFFICER FAY: Okay. We'd like  
20 to take a --

21 MS. CHURNEY: Hearing Officer Fay, --

22 (Pause.)

23 HEARING OFFICER FAY: Mr. Harris, do you  
24 have any redirect?

25 MR. HARRIS: I don't, but I have a

1 couple housekeeping matters, at the appropriate  
2 time.

3 HEARING OFFICER FAY: Okay. We do want  
4 to take brief public comment on air quality --

5 MS. CHURNEY: Excuse me, Hearing Officer  
6 Fay. There are two matters. First of all, we  
7 have to introduce all of our exhibits and get  
8 them, or have them accepted into the record. And  
9 all of our declarations, which we haven't done  
10 yet. So I'd like to do that before public  
11 comment.

12 But, additionally, I would request leave  
13 to recall Ms. Soderbeck on one point only, and  
14 that is with respect to how we believe,  
15 inadvertently I'm sure, Mr. Rubenstein  
16 mischaracterized her testimony with respect to the  
17 Levy Spengler report. And it would be on one item  
18 alone.

19 MR. HARRIS: She had the opportunity to  
20 object on that issue --

21 MS. CHURNEY: We did object.

22 MR. HARRIS: Then you were overruled, so  
23 we're done.

24 HEARING OFFICER FAY: We're not going to  
25 entertain that. We are going to give you leave to

1 enter your exhibits.

2 What was your housekeeping point, Mr.  
3 Harris?

4 MR. HARRIS: Two things. Number one, I  
5 would like to request that the exhibits, the so-  
6 called rebuttal testimony exhibits, that those be  
7 filed and served so that I can make sure that we  
8 have true and correct copies of all those  
9 documents for our files. We've had to kind of  
10 share them among the three of us up here. And I  
11 think there may be folks who aren't here who ought  
12 to have copies of those documents.

13 And so I'd just ask that CAPE, first  
14 off, my first point, just basically serve true and  
15 correct copies of those documents.

16 HEARING OFFICER FAY: And we'll grant  
17 that; that's reasonable. And I've already  
18 discussed with CAPE about confirming the filed  
19 copy of Ms. Soderbeck's testimony, so we get a  
20 true and accurate copy in the docket record.

21 Okay, Ms. Churney, do you want to  
22 move --

23 MR. HARRIS: Second and related point.

24 HEARING OFFICER FAY: I'm sorry?

25 MR. HARRIS: Second and related point on

1       these documents. You know, we've had quite a  
2       little discussion this morning about what the  
3       proper rebuttal testimony, and I think it's really  
4       important on a going-forward basis that the Chair  
5       and the Hearing Officer speak very clearly so that  
6       we know with land use and the rest of this  
7       testimony whether we're going to expect this kind  
8       of chicanery of bringing documents to the hearing  
9       when people know that they want to use them.

10               And so, my request would be that you  
11       orally today clarify your intent as it relates to  
12       those kind of documents, especially as it respects  
13       to the prefiled testimony.

14               This hearing today, in my estimation,  
15       took a lot longer than it should have because we  
16       spent most of our time scrambling, when last night  
17       instead of having a nice leisurely dinner in Morro  
18       Bay, we could have been preparing if we'd had  
19       those documents. So, you know, thank you for the  
20       nice dinner, but I would rather have the  
21       opportunity to prepare for those documents.

22               And so I would like some ruling from the  
23       rostrum as to that issue, either now, or towards  
24       the end of the day after you've had some time to  
25       consider that.

1 MS. CHURNEY: Excuse me, if I might  
2 respond before there's a decision. First of all,  
3 there was no chicanery. I think your request to  
4 the Hearing Officer at this point shows that there  
5 was no chicanery because there was no order, and  
6 there is still no order with respect to providing  
7 rebuttal testimony or exhibits prior to rebuttal.

8 So, I am in full agreement if the  
9 Hearing Officer wishes to clarify that point in  
10 writing for us. And orally today, going forward,  
11 I have no problem with that. But prior to today  
12 there was no order or rule providing otherwise.

13 HEARING OFFICER FAY: We've always  
14 operated, as a matter of practice, and perhaps we  
15 haven't been clear enough, that we, at all costs,  
16 want to avoid surprise. We've been flexible on  
17 rebuttal when it's been relatively limited.

18 I don't consider the package that came  
19 in today to be limited. And while I don't have a  
20 problem with receiving these, or at least removing  
21 them at this time, I think going forward we will  
22 say that all rebuttal testimony must be served in  
23 advance.

24 And if it is a minor correction, it must  
25 be served on all parties as far in advance as

1 physically possible.

2 And basically what that means is that  
3 nobody can come in on the day of the hearing and  
4 offer that, other than typographical and very  
5 minor corrections that they might make on the  
6 stand.

7 And I hope that's clear for everybody so  
8 that we don't have the element of surprise. That  
9 is the bottomline. We're trying to allow  
10 everybody to be prepared when they come before the  
11 Committee.

12 All right, Ms. Churney, did you want to  
13 move these documents? And what I must ask you to  
14 do is go through each one, give the number of the  
15 document and a brief summary of its title so that  
16 we can locate it in the record.

17 MS. CHURNEY: Okay, let me first start  
18 with the declarations that we have not yet gotten  
19 into evidence. And there's only one at this  
20 point, and that's the declaration of Sylvia Torsky  
21 Baumgardner relating to air quality and public  
22 health issues.

23 We had indicated early on that that  
24 would be offered solely to authenticate the  
25 documents attached to it. And for that purpose

1 alone we are offering it into evidence at this  
2 time.

3 HEARING OFFICER FAY: That's a portion  
4 of exhibit 139.

5 MR. HARRIS: When did you clarify that  
6 that was going to be offered only to verify the  
7 documents, and that Ms. -- I won't even try to say  
8 the name -- was not going to be appearing in  
9 person?

10 MS. CHURNEY: It was early on. I don't  
11 even think it was at the last hearings, I think it  
12 was at the hearings prior to that even.

13 MR. HARRIS: So you say somewhere on the  
14 record --

15 MS. CHURNEY: It is on the record.

16 MR. HARRIS: -- you indicated that?

17 MS. CHURNEY: Yes.

18 MR. HARRIS: Okay, I don't recall that,  
19 so if you could help me understand when that  
20 occurred?

21 MS. CHURNEY: I'll find the exact  
22 citation for you. I don't have the transcripts  
23 here with me.

24 HEARING OFFICER FAY: I believe she did  
25 indicate that Ms. -- Baumgardner would not be



1 appearing. Is there objection?

2 MR. HARRIS: I'll object.

3 HEARING OFFICER FAY: Okay. Subject to  
4 objection, that is received for the purpose of  
5 identifying her testimony as her declaration and  
6 associated attachments.

7 MS. CHURNEY: So I would move into  
8 evidence that portion of exhibit 139 at this  
9 point.

10 HEARING OFFICER FAY: All right. So  
11 moved.

12 MS. CHURNEY: And then CAPE has  
13 indicated a number of exhibits that we have been  
14 designated by the applicant. We just want to make  
15 sure -- and they have been introducing parts of  
16 these exhibits throughout the course of these  
17 hearings.

18 We just want to make absolutely sure  
19 that all of these exhibits are before the  
20 Committee and are introduced. So in an abundance  
21 of caution we would move exhibits 22, 23, 34, 36,  
22 37, 38, 44, 52, 53 and 103 in their complete form  
23 into evidence at this time.

24 MR. HARRIS: I'll have to admit that  
25 you've gone a little too fast for me, so why don't

1 we go through those. Can you again tell me the  
2 preamble for why we're doing this at this point?

3 MS. CHURNEY: Okay, these are listed in  
4 our prefiled testimony. It's page 2 if you want  
5 to refer to it. They're all listed there.

6 And the reason is the applicant has been  
7 introducing these piecemeal, portions. These are  
8 responses to data requests, by the way. And  
9 applicant has been introducing portions of them.  
10 And it appears so far that certain portions the  
11 applicant is choosing and selecting that are  
12 helpful to the applicant's case, and leaving out  
13 portions that may not be helpful.

14 We want to just make absolutely clear  
15 that every part of these data requests are in  
16 evidence.

17 MR. HARRIS: And we would object to  
18 that. It's the applicant's right to put in some,  
19 none or all of those data requests. And we've put  
20 in the ones we've chosen to put in. CAPE's had  
21 equal opportunity to offer those things. They  
22 have chosen not to do so

23 MS. CHURNEY: No, we're doing it right  
24 now.

25 MR. HARRIS: You're not going to do it

1 right now. Again, prefiled testimony. I'll say  
2 it again to you, --

3 MS. CHURNEY: It was --

4 HEARING OFFICER FAY: Ms. Churney, --

5 (Parties speaking simultaneously.)

6 HEARING OFFICER FAY: -- we've moved  
7 beyond that, and I'll entertain a written request;  
8 and at the next hearing we will take a look at  
9 those --

10 MS. CHURNEY: Excuse me, this is in our  
11 prefiled testimony. This was filed months ago.

12 HEARING OFFICER FAY: Can you refer me  
13 to the --

14 MS. HOLMES: Can I weigh in on this? I  
15 may be sharing the same concern that Ms. Churney  
16 has. To the extent that Duke identified certain  
17 exhibits in their prefiled testimony and they  
18 haven't come into evidence, which I believe may  
19 have happened, we did not prepare to introduce,  
20 for example, their responses when they listed them  
21 in their testimony.

22 To the extent that these are exhibits  
23 that Duke has listed in its prefiled testimony I  
24 do think it's appropriate to put them into the  
25 record.

1 MR. HARRIS: Mr. --

2 MS. HOLMES: Is that --

3 MR. HARRIS: -- I think there's some  
4 confusion here.

5 MR. ELLISON: Since we're talking about  
6 what's been going on across a number of topic  
7 areas, I'm going to step in at this point because  
8 I've been representing Duke generally in this  
9 matter. Let me say a couple of things.

10 First, the direction we have given our  
11 witnesses is to include in their testimony the  
12 data responses that are relevant to that topic.  
13 So it is true that we have not included an entire  
14 package of data responses; but to my knowledge we  
15 have included all of the answers from a set of  
16 data responses that are pertinent to that  
17 particular topic area.

18 If CAPE, in its prefiled testimony, is  
19 asking to introduce additional responses provided  
20 by Duke in this docket, we do not object to that  
21 in their prefiled testimony.

22 If they're seeking to introduce  
23 something that's not in their prefiled testimony,  
24 that's a different topic.

25 MS. CHURNEY: No, this is in our

1 prefiled testimony, page 2.

2 HEARING OFFICER FAY: Page 2?

3 MS. CHURNEY: Yes.

4 MR. HARRIS: Page 2 of what?

5 MR. ELLISON: But let me be clear. If  
6 this is -- what I think is going on here is that  
7 you are introducing packages of data responses  
8 that cover a wide range of topic areas as part of  
9 your air quality testimony.

10 MS. CHURNEY: Right.

11 MR. ELLISON: And that there are a whole  
12 bunch of data responses that are irrelevant to air  
13 quality, they're included in what's being admitted  
14 into evidence here. Do we agree that that's the  
15 case?

16 MS. CHURNEY: That is possibly correct,  
17 with --

18 MR. ELLISON: Okay, --

19 MS. CHURNEY: -- respect to some of  
20 these exhibits.

21 MR. ELLISON: All right. With that  
22 understanding, and with the understanding that the  
23 Committee will review these things for relevance  
24 as they are cited in the briefs, I don't have an  
25 objection.

1 HEARING OFFICER FAY: Okay. We will not  
2 accept those today. We'll preserve your motion,  
3 but until I get a true and correct copy of your  
4 testimony, I cannot even refer to the exhibits  
5 that you cite. And I do not have them in front of  
6 me.

7 So, when I get --

8 MS. SODERBECK: You don't have our  
9 prefiled testimony on this topic?

10 HEARING OFFICER FAY: I have a version  
11 that is clearly not the version that you have --

12 MS. CHURNEY: But page 2 is the same, I  
13 mean if you look at page 2.

14 MR. HARRIS: Page 2 --

15 MS. SODERBECK: Exhibit 139.

16 MR. HARRIS: Page 2 of what? The  
17 declarations or --

18 MS. CHURNEY: Of exhibit 139.

19 MS. SODERBECK: No, it's entitled  
20 testimony authored by.

21 HEARING OFFICER FAY: Oh, I see, and  
22 you've assigned it Duke's exhibit numbers?

23 MS. SODERBECK: Correct.

24 HEARING OFFICER FAY: Okay. All right,  
25 subject to Committee review, then -- could you

1 make your motion again?

2 MS. CHURNEY: Well, I'm in the process.

3 I mean there are other exhibits, but we are  
4 requesting that exhibits that have previously been  
5 marked by the applicant, exhibit numbers 22, 23,  
6 34, 36, 37, 38, 44, 42 -- 52, rather, 53 and 103  
7 be introduced into the record in their complete  
8 form.

9 HEARING OFFICER FAY: Okay. And do we  
10 have an objection to that?

11 MR. HARRIS: Yes, we do. I'd like that  
12 reduced to writing, for one thing, she stumbled  
13 through there. I wasn't sure I got all the  
14 numbers, in fact I'm sure I didn't get all the  
15 numbers.

16 And secondly, we're going to need some  
17 time to study the request to see whether it's  
18 valid. It may be as Mr. Ellison has characterized  
19 it, --

20 MS. CHURNEY: What you --

21 MR. HARRIS: -- a valid request, but --

22 MS. CHURNEY: You've had this document  
23 since January 15th. I don't understand why you  
24 wouldn't have had time to make an evaluation --

25 HEARING OFFICER FAY: Ms. Churney, the

1 discussion is terminated. The Committee will not  
2 receive these into evidence at this time. A  
3 motion has been made. We'll withhold ruling on  
4 the motion. And we direct CAPE to submit a  
5 description of these exhibits and a one-line  
6 connection to their reason for moving them.

7 And applicant will have five days to  
8 respond before the Committee will rule.

9 MR. HARRIS: Five business days?

10 HEARING OFFICER FAY: And then in  
11 addition -- no --

12 MS. CHURNEY: Okay, there are additional  
13 exhibits that we're also seeking to introduce at  
14 this point. One is the CEC's response to CAPE's  
15 first set of data requests to the CEC dated  
16 September 12, 2001.

17 MR. HARRIS: What are these? Is this a  
18 surrebuttal rebuttal testimony?

19 MS. CHURNEY: No.

20 MR. HARRIS: Where is this --

21 MS. SODERBECK: Jeff, these are things  
22 that I had handed you personally, copies of, in  
23 about a couple of hearings ago.

24 MR. HARRIS: Well, you know, I'm stuck  
25 on prefiled again.



1 MS. SODERBECK: Well, it is. It is. It  
2 was referenced in our prefiled testimony and  
3 specified right there on page 2.

4 They were filed, we gave a copy to  
5 Roberta, as well, to have them -- for docketing  
6 purposes. But we physically handed them to you, I  
7 physically handed them to you at the previous  
8 hearing. And one was an APCD brochure, and the  
9 other was the CEC responses.

10 MR. HARRIS: Well, the purpose --

11 MS. HOLMES: Staff has no objection to  
12 its data requests coming into the record.

13 HEARING OFFICER FAY: Okay. All these,  
14 and I assume the last one, too, the APCD brochure,  
15 you're going to move that, as well?

16 MS. SODERBECK: Right.

17 HEARING OFFICER FAY: Okay, all these  
18 are subject to the same thing. Please submit a  
19 brief description, reference today's hearing, and  
20 the Committee will withhold ruling on that.

21 And then I assume you have some  
22 additional --

23 MS. CHURNEY: Yes, --

24 HEARING OFFICER FAY: -- today's?

25 MS. CHURNEY: Yes. Exhibit numbers 178,

1 179, --

2 HEARING OFFICER FAY: I'm sorry, you're  
3 going to have to give us a brief description of  
4 each one.

5 MS. CHURNEY: Okay. 178 is the  
6 investigation of artifacts, the S. Wien, GE Energy  
7 study and analysis.

8 HEARING OFFICER FAY: Okay.

9 MS. CHURNEY: 179 is the compendium of  
10 applications for certifications for Western Midway  
11 Sunset, Elk Hills Power project, and Sunrise Power  
12 project.

13 Exhibit 180 is the emission test report  
14 for emissions tests at Hidalgo and Occidental  
15 Texas.

16 HEARING OFFICER FAY: And that was  
17 previously offered --

18 MS. CHURNEY: 180, yes.

19 HEARING OFFICER FAY: Not offered today?

20 MS. CHURNEY: No, offered today.

21 MR. HARRIS: These are all --

22 MS. CHURNEY: These are all --

23 MR. HARRIS: -- today's.

24 MS. CHURNEY: These are all offered  
25 today.

1 HEARING OFFICER FAY: Okay.

2 MS. CHURNEY: 181 was the PM2.5 test  
3 goals, PowerPoint presentation. 182 was the Levy  
4 and Spengler modeling benefits of plant emission  
5 controls in Massachusetts.

6 183 is the Pope March 6, 2002 article  
7 regarding lung cancer, cardiopulmonary. And 184,  
8 I believe that was -- by Ms. Holmes; it's the  
9 OEHHA/CARB review of California standards, the  
10 public draft of November 30, 2001.

11 HEARING OFFICER FAY: So, as to exhibits  
12 178 through 184, is there objection?

13 MR. HARRIS: Yes. And I'd like to go  
14 through them individually, if I could.

15 We actually have no objection to exhibit  
16 182. 182 is the Levy and Spengler article. It  
17 was referenced by Dr. Hartman in his testimony. I  
18 contacted CAPE and received a copy of that  
19 document electronically in advance of this  
20 hearing. And thus we were able to analyze that  
21 testimony as if it were prefiled. And so I would  
22 have no objection to number 182.

23 As to 178, 179, 180, 181 and 183 and  
24 184, -- excuse me, 183, not 184, we would object.

25 HEARING OFFICER FAY: Okay. And no

1 objection to 184, is that correct?

2 MR. HARRIS: Correct, no objection to  
3 184.

4 HEARING OFFICER FAY: All right.  
5 Exhibits 182 and 184 will be received into  
6 evidence. And again, we'll just add the others to  
7 the list, and receive a very brief description as  
8 per my previous instructions. And applicant will  
9 have five calendar days to respond. And we'll  
10 keep this very brief. The Committee will rule on  
11 the admissibility of these.

12 MS. CHURNEY: I'm sorry, I didn't catch  
13 whether you had given us a time limit within which  
14 to present those to you?

15 HEARING OFFICER FAY: We'll give you  
16 seven days.

17 MR. HARRIS: Mr. Fay, in the interests  
18 of moving things forward I would withdraw my  
19 objections to those documents. I don't want to  
20 make CAPE take additional time to write them up.  
21 178 through 184, I withdraw my objections.

22 HEARING OFFICER FAY: Okay. Fine. Is  
23 there any other objection to receiving these  
24 exhibits?

25 All right, hearing none they'll be

1 entered at this time.

2 And we'd like to move on to public  
3 comment before we take a break, and then go into  
4 land use.

5 I'm afraid as happens from time to time,  
6 we are limited in our time. And I'd like to ask  
7 that people keep their remarks to no more than  
8 three minutes. The topic is air quality, so now  
9 is the appropriate time to make your remarks  
10 regarding air quality.

11 David Nelson.

12 MR. NELSON: Hi, my name's David Nelson.  
13 I'm a resident of Morro Bay. This air is totally  
14 confusing to the residents of Morro Bay, but what  
15 I can say is that when Duke came to town they  
16 promised us a cleaner, smaller, better power  
17 plant. The combined cycle may be better.

18 Smaller, I don't think it is. It's gone  
19 from a nine-acre site to a 14-acre site. And  
20 cleaner, I've sat through this whole meeting today  
21 and, you know, I've looked at the AFC, and I've  
22 looked at comparisons to other towns in that AFC  
23 with maximum loads and all this.

24 And it's kind of confusing to me, but it  
25 seems to me that Morro Bay sustains a larger

1 number of particulate fallout from this power  
2 plant than do our neighbors in Los Osos or Cayucas  
3 or Cambria, as documented in chapter 6 of the AFC.  
4 It shows that, you know, we're like 2.7 ppb,  
5 whereas Cayucas, which is only a few miles away,  
6 is .06 or somewhere in that neighborhood.

7 So, we're really substantially getting  
8 more of this particulate matter. And with all  
9 these reports and sure they're coal-fired plants,  
10 or bigger populations, but we're still breathing  
11 this stuff.

12 I mean I've lived here for 22 years and  
13 PG&G had a long record of painting cars that we're  
14 being burnt by this power plant that's existing  
15 here.

16 So what I'm asking from the Commission  
17 is that at least keep it so that we're not getting  
18 more, even more pollution from this twin cycle  
19 plant. That plant's going to run a lot more.

20 This plant was sited here 50 years ago  
21 when we had no rules. And over the 50-year period  
22 very few rules seemed to apply to it. There's  
23 citations of no studies. And why isn't there  
24 studies? Because the thing was already running  
25 and nobody thought to do any studies. And it's

1 ran for 50 years.

2 And now we're using a 50-year, unstudied  
3 plant as a baseline to set up pollution for the  
4 next 50 years. I think we can do lots better.  
5 And I think that it's your job, and I'm really  
6 confident that you'll look at this, and weigh the  
7 evidence.

8 We don't want any more pollution in this  
9 town. If there's one thing that we have in common  
10 in this town, and there's big lines on people who  
11 want this plant and people who don't want this  
12 plant, but the one common thread down the middle  
13 is that people on both sides don't want more  
14 pollution.

15 And I don't think we deserve more  
16 pollution. This plant, like I say, has been  
17 licensed for 50 years. And the City has an  
18 opportunity to say enough of this. But instead of  
19 that, they'd rather have money. So I want the  
20 money overshadowed by, you know, common sense  
21 approach to this particulate matter, in  
22 particular. Let's not have any more.

23 And if it means doing away with the duct  
24 firing to lower it, let's consider it.

25 Thank you.

1                   HEARING OFFICER FAY: Thank you. Larry  
2                   Sheers.

3                   MR. SHEERS: Hi, I'm Larry Sheers. I'm  
4                   a resident of Morro Bay for the past 20 years. I  
5                   have COPD, asthma. It took me three times on a  
6                   respirator and one heart attack to realize that I  
7                   could no longer walk around Morro Bay.

8                   In order for me to walk around I have to  
9                   leave town, Paso Robles or better. This is an  
10                  oximeter. It shows me how much oxygen is in my  
11                  body.

12                  Here about oh couple three weeks ago I  
13                  noticed there was an excessive amount of smoke  
14                  coming from the stack at Morro Bay. I can see it  
15                  right out of my window there.

16                  I called them up and I, you know, I  
17                  tried to call them up and find no number. So I  
18                  called -- Farrell; he gave me the number of the  
19                  plant.

20                  And I called the plant, and they told me  
21                  that they'd call the engineer and the engineer  
22                  would tell me what was going on. Well, the  
23                  engineer did call and he told me that there was  
24                  nothing wrong, it was an atmospheric condition.

25                  And yeah, there was certainly an



1 atmospheric condition, they're polluting the hell  
2 out of the atmosphere, that's what was going on.  
3 Because I was on oxygen, even with all my filters  
4 and filtration systems, I had to go on oxygen.

5 Okay, so a little while later I got a  
6 call from the Environmental Protection Agency, and  
7 they tell me that -- I asked them, I said, well,  
8 how did you get my number. And they said, well,  
9 whenever there's a complaint filed, or called in,  
10 why they refer it to us.

11 And I said, how come then I had to get  
12 the information, you know, it was not available by  
13 calling the information or not in the phone book,  
14 you know. And they says, well, I don't know about  
15 that, but you know, your credibility is lacking  
16 somewhat.

17 In fact, you know, not long after that I  
18 noticed they were carting off parts and pieces.  
19 So if you're going to try to tell me that you  
20 weren't polluting the atmosphere I'm not going to  
21 buy that.

22 You know, I asked the guy, I said, well,  
23 what if they are. How much are they going to fine  
24 them. Oh, -- maybe \$4000, \$5000, \$15,000, it  
25 depends. Okay, while you're making a million

1       dollars, you know, \$5000 is no big deal.

2               Well, it's a big deal to me because it's  
3       my life. And I don't owe you one day of it. And  
4       if you can't run this plant now, what are you  
5       going to do three years down the line when you get  
6       this other, this monstrous thing.

7               You're not going to tell me that you're  
8       going to be able to produce -- kilowatts without  
9       producing more pollutants in the air. And right  
10      now, I'm maxed out. This is about as much as I  
11      can handle.

12              So, I think you might want to rethink  
13      your credibility factors, and you know, you might  
14      want to think about us people that have to live  
15      here. And I'm not unique by any means. There's a  
16      lot of people that are on oxygen.

17              In fact, my oxygen man tells me that  
18      there's a whole lot of people here in Morro Bay  
19      and the surrounding areas that are on oxygen, that  
20      have, you know, -- I can't even hire an attorney,  
21      you know, no attorney will take my case. So I  
22      have no legal recourse. I couldn't sue anybody if  
23      I wanted to. I wouldn't live long enough to go  
24      through court to even see any of that money. So  
25      it's useless. So I have no recourse.

1           So you don't even have to listen to me.  
2       You'll get your plant, no question about it, the  
3       current administration, the way things look. But,  
4       you know, and I might get three years before you  
5       get it there. And that may be long, I can get the  
6       heck out of this town. But, I really hate to.

7           But that's how I feel about it. And,  
8       so, there it is, the bottomline.

9           PRESIDING MEMBER KEESE: Thank you.

10          HEARING OFFICER FAY: Thank you, sir.  
11       Doris Murray.

12          MS. MURRAY: Good afternoon,  
13       Commissioners. I'm Doris Murray, and I live at  
14       236 Surf Street in Morro Bay. Just two blocks  
15       downwind from the plant.

16          And I'd like to put a human face on all  
17       this scientific data. I'm 81 years old and a  
18       many-stroke victim. I moved here in 1984 and I  
19       was told that PG&E would be gone in ten years.

20          About 1991 I had my first TIA. I was  
21       working at Sun Bulletin, and was alone during the  
22       lunch hour; ran to answer the phone and just  
23       collapsed, fell to the floor. And I was still  
24       there when everybody got back from lunch.

25          A neurologist told me much later that

1       that was the beginning. I feel like I can't  
2       breathe, and so I have this oxygen tank which I  
3       use nearly always at night. The point is I have  
4       to keep the windows shut in my bedroom because of  
5       this dirt. Now, all I did was moisten a napkin  
6       and swipe it across my bedroom window sill. And  
7       there it is. And that's -- oh, it might be two  
8       days, you know, might have accumulated over two  
9       days. But I do at least clean my house once a  
10      week.

11                If you'd like to see the actual scene,  
12      I'm only two blocks up the street. And I'd be  
13      happy to show you my particular problem, or is  
14      that particulate, I'm pretty sure.

15                Thank you so much.

16                PRESIDING MEMBER KEESE: Thank you.

17                HEARING OFFICER FAY: Thank you. Nelson  
18      Sullivan.

19                MR. SULLIVAN: Good afternoon. I'd like  
20      to go on record as protesting the substitution of  
21      the 145 foot stacks in the proposed plan for the  
22      existing 450 foot stacks now in use.

23                The proposed stacks are short and  
24      apparently used in -- appropriately used in  
25      populated areas, unpopulated areas where health

1 concerns are merely on site.

2           Conversely, not only will these be in  
3 the center of a city, but prevailing winds will  
4 transport exhaust from them to nearby homes that  
5 are above the level of these short stacks.

6           There is no argument that I know that  
7 taller stacks have superior penetration of  
8 inversion layers.

9           I believe that CEQA mandates the  
10 existing stacks or better, not worse, should be in  
11 any Morro Bay future power plant.

12           I made similar comments during a pre-  
13 evidentiary hearing that was held at the Duke  
14 plant, and submitted comments that were not  
15 answered or acknowledged. I questioned why these  
16 450 foot stacks in the new plant -- I questioned  
17 why not use these 450 foot stacks in the new plant  
18 by ducting exhaust to them from the new plant  
19 through underground ducts.

20           The residents of Morro Bay need your  
21 protection. Our APCD is charged with district-  
22 wide responsibility, alone, and not our City. And  
23 our City representatives have been sold on the new  
24 plant project, with the exception of a single  
25 Council Member.

1 Thank you.

2 HEARING OFFICER FAY: Thank you, sir.

3 PRESIDING MEMBER KEESE: Thank you.

4 HEARING OFFICER FAY: Don Boatman.

5 MR. BOATMAN: Don Boatman, a resident of  
6 Morro Bay. No one today I've seen thank you for  
7 having another meeting here in Morro Bay, but we  
8 really appreciate being able to come to these  
9 meetings and see this happen, rather than having  
10 to drive to Sacramento. Thank you.

11 I have two concerns just about things  
12 today in the meeting. And the first one is that  
13 the CEC has required Duke to have community  
14 outreach meetings throughout the time they've  
15 applied for the plant. And this is to inform the  
16 public of what they're doing and how they're doing  
17 it.

18 They've had a lot of meetings. I've  
19 read a lot of newspaper articles where they also  
20 printed what they were going to do. And always  
21 they said that this would be a cleaner plant, you  
22 know, cleaner air. And I'll use the words of one  
23 of the Duke spokesmen, either through  
24 misinformation or disinformation, or not really  
25 understanding: Lay people don't understand that

1       being cleaner per megawatt hour may not make the  
2       air cleaner for the person that lives here.

3               I don't consider myself a layperson. I  
4       work in the power plant industry, and people who  
5       have studied know that the new plant may be  
6       cleaner per megawatt hour, in some cases. But  
7       that the total pollution, air pollution that the  
8       citizens here in Morro Bay will get is greater.

9               And I resent that the outreach programs  
10      have misrepresented what the Morro Bay citizens  
11      may get.

12              I heard just this afternoon that 76 more  
13      tons of PM than the existing plant. And so I  
14      question the outreach program in its efforts to  
15      really tell us what air we're going to get from  
16      the new plant versus the old plant. That's one  
17      concern.

18              The other is that the Air Pollution  
19      Control District says we're only -- the new plant  
20      will only produce .4 of 1 percent pollution in its  
21      air basin. But, that doesn't mean anything to  
22      Morro Bay. We're right here where the plant is.  
23      And the information we should be getting is what's  
24      going to happen to us on the ground right here.

25              I understand the Air Pollution District

1 is looking areawide, and this is maybe nothing for  
2 them. But for someone who lives a half mile from  
3 the plant downwind, like I do, it means a lot.

4 That's all I have. Appreciate your  
5 interest. Thank you.

6 HEARING OFFICER FAY: Thank you, sir.

7 PRESIDING MEMBER KEESE: Thank you very  
8 much.

9 HEARING OFFICER FAY: We also have a  
10 comment card, is Todd Barnes here? Okay, Mr.  
11 Barnes, I guess, couldn't stay. He voiced  
12 concerns that the public health may be hurt by  
13 Duke's proposed new power plant. And has concerns  
14 that "our fragile estuary will continue to be hurt  
15 by the plant. Human and marine life is being  
16 negatively impacted." And those are his concerns.

17 All right. We want to take a ten-minute  
18 break now. And by ten minutes I mean that I will  
19 challenge Mr. Ellison to have his witness begin  
20 speaking in ten minutes. And if the rest of you  
21 aren't here, you'll miss it.

22 PRESIDING MEMBER KEESE: Thank you.

23 (Brief recess.)

24 HEARING OFFICER FAY: Mr. Ellison, are  
25 you ready to present your witness on land use?



1 MR. ELLISON: Yes, we are. We have a  
2 panel. I call to the stand as the lead witness,  
3 Mr. Kirk Marckwald, as supporting witnesses Mr.  
4 Ron Van Buskirk, Mr. Paul Curfman, Mr. Jeff Ferber  
5 and Mr. Bob Mason.

6 To my immediate left are three members  
7 of the panel, Mr. Marckwald, Mr. Van Buskirk and  
8 Mr. Mason. And the other two members of the panel  
9 are sitting at this table to my right, Mr. Ferber  
10 and Mr. Curfman.

11 HEARING OFFICER FAY: I believe some of  
12 the panel members have not been previously sworn?

13 MR. ELLISON: That's correct.

14 HEARING OFFICER FAY: I'd ask that they  
15 stand at this time and that the court reporter  
16 please swear them in.

17 Whereupon,

18 KIRK MARCKWALD, RON VAN BUSKIRK, ROBERT MASON,  
19 PAUL CURFMAN and JEFF FERBER  
20 were called as witnesses herein, and after first  
21 having been duly sworn, were examined and  
22 testified as follows:

23 MR. ELLISON: Thank you.

24 //

25 //

1 DIRECT EXAMINATION

2 BY MR. ELLISON:

3 Q Beginning with Mr. Marckwald, could each  
4 of you state and spell your name for the record,  
5 please.

6 MR. MARCKWALD: Yes. My name is Kirk  
7 Marckwald, M-a-r-c-k-w-a-l-d.

8 PRESIDING MEMBER KEESE: Hold it,  
9 confirm, --

10 MS. HOLMES: I believe that the Coastal  
11 Commission was offered the opportunity to  
12 participate via conference call, via telephone.

13 PRESIDING MEMBER KEESE: I believe  
14 they're on the phone.

15 MR. CHIA: I'm on the line. This is Dan  
16 Chia.

17 HEARING OFFICER FAY: Okay, if you'd  
18 just like to listen, the applicant is just  
19 beginning its testimony on land use.

20 MR. CHIA: Great.

21 MR. ELLISON: You sound like the voice  
22 of God, Dan.

23 (Laughter.)

24 MR. CHIA: I would imagine I'm being  
25 echoed quite voluminously.

1 MR. ELLISON: All right, let's begin  
2 over again. We were just barely beginning.

3 Mr. Marckwald, could you state and spell  
4 your name for the record. And then after that,  
5 the remaining members of the panel, as well.

6 MR. MARCKWALD: Yes. My name is Kirk  
7 Marckwald, M-a-r-c-k-w-a-l-d.

8 MR. ELLISON: Mr. Van Buskirk.

9 MR. VAN BUSKIRK: My name is Ron Van  
10 Buskirk, V-a-n B-u-s-k-i-r-k.

11 MR. MASON: My name is Robert Mason,  
12 M-a-s-o-n.

13 MR. CURFMAN: Paul Curfman, C-u-r-f,  
14 like Frank, -m-a-n.

15 MR. FERBER: Jeff Ferber, F-e-r-b-e-r.

16 MR. ELLISON: Thank you. I'll direct my  
17 questions to Mr. Marckwald, as the lead witness.  
18 And I understand we are now identifying portions  
19 of group two testimony separately by topic. So I  
20 would ask for an exhibit number for the  
21 applicant's land use testimony.

22 HEARING OFFICER FAY: That will be  
23 exhibit 185 and it is identified as land use  
24 testimony. And it's, what, 76 pages?

25 MR. ELLISON: I believe that's correct.

1 HEARING OFFICER FAY: Okay.

2 BY MR. ELLISON:

3 Q Mr. Marckwald, do you have a copy of  
4 exhibit 185 in front of you?

5 MR. MARCKWALD: Yes, I do.

6 MR. ELLISON: And does exhibit 185  
7 include statements of the qualifications of all  
8 the members of the panel?

9 MR. MARCKWALD: It does.

10 MR. ELLISON: Beginning with yourself,  
11 and then the remaining members of the panel, could  
12 each of you briefly summarize your qualifications.

13 MR. MARCKWALD: I am the Founder and  
14 Principal of California Environmental Associates.  
15 I work with trade associations, companies,  
16 foundations, and educational institutions to  
17 identify and assess environmental problems.

18 I've worked on energy issues in  
19 California for the last 20 years, both as a  
20 representative of the government, as Under  
21 Secretary of the Natural Resources Agency, and  
22 also in my firm.

23 In the energy area I've worked both for  
24 Duke Energy in the Moss Landing proceeding, as  
25 well as several cogeneration facilities at both

1 industrial sites, as well as institutions on both  
2 siting and permitting issues.

3 I have a masters of science in natural  
4 resources policy and management from the  
5 University of Michigan.

6 MR. ELLISON: Just proceed through the  
7 members of the panel, please, Mr. Van Buskirk and  
8 Mr. Mason and Mr. Curfman and Mr. Ferber.

9 MR. VAN BUSKIRK: Thank you. My name is  
10 Ron Van Buskirk, again. I'm a partner in the  
11 lawfirm of Pillsbury Winthrop in San Francisco.  
12 I've been actively practicing law in California  
13 since 1974. The bulk of that practice has been  
14 involved with land use matters in California,  
15 specializing in matters involving the California  
16 Environmental Quality Act, the Coastal Act.

17 A large part of that practice has been  
18 with regard to energy type facilities on the  
19 coast, including oil and gas facilities, as well  
20 as thermal energy plants and other types of  
21 similar facilities.

22 I received my law degree in 1974 from  
23 the University of Michigan.

24 MR. MASON: My name is Robert Mason. I  
25 have 22 years of experience in the preparation of

1 environmental impact reports, environmental impact  
2 statements, and applications for certification for  
3 various industrial projects, including combined  
4 cycle natural gas fired power plants.

5 I oversee, as a Director of Projects,  
6 multi-disciplinary teams and have experience in  
7 evaluating the land use and siting issues.

8 I have a bachelors and a masters in  
9 urban regional studies from USC.

10 MR. CURFMAN: I'm Paul Curfman. I am an  
11 Associate at EDAW, Incorporated, at their  
12 headquarters in San Francisco. I've worked on  
13 various visual analyses for Duke, including the  
14 Moss Landing AFC, and also the Morro Bay project.

15 I've worked on transmission siting cases  
16 in Nevada, as well as highway construction  
17 projects and landscape architectural projects in  
18 Colorado.

19 I'm a registered landscape architect in  
20 the State of California. And my degree is a  
21 bachelor of landscape architecture from the  
22 University of Oregon.

23 MR. FERBER: My name is Jeff Ferber.  
24 I'm a Principal at RRM Design Group in San Luis  
25 Obispo. I'm the Director of Planning and

1 Landscape Architecture in the San Luis Obispo  
2 office.

3 My degree is a bachelors of landscape  
4 architecture from CalPoly San Luis Obispo. And my  
5 focus on this project has been physical land  
6 planning, coastal access, mapping issues.

7 My background is primarily in coastal  
8 access, coastal planning in California  
9 communities.

10 MR. ELLISON: Thank you. Mr. Marckwald,  
11 do you have any additions, corrections or  
12 clarifications that you would like to make to  
13 exhibit 185 at this time?

14 MR. MARCKWALD: Yes, I do.

15 MR. ELLISON: Would you please describe  
16 them.

17 MR. MARCKWALD: On page 4, the exhibit  
18 that was identified as 133, should be identified  
19 as 75.

20 On page 10, fourth paragraph down, the  
21 third line at comma a permitted should be struck  
22 and insert instead permitting. So permitting for  
23 permitted.

24 The same change on page 11, the fourth  
25 full paragraph down, second line, the sentence

1       that begins: Consistent with the Coastal Act,  
2       strike permitted in favor of permitting.

3               Going to the paragraph immediately above  
4       that, on the second line, offsite parking parcels  
5       as agriculture with combining designations, insert  
6       in front of SRV the letters SRA.

7               And finally, on page 50 of the  
8       testimony, under the LU-64.1, insert the following  
9       sentence: Duke is not proposing --

10              MR. ELLISON: Excuse me, Mr. Marckwald,  
11       which table are you at?

12              MR. MARCKWALD: I'm sorry, in the basis  
13       for consistency.

14              MR. ELLISON: Thank you.

15              MR. MARCKWALD: The fourth column over.  
16       Insert: Duke is not proposing, quote, "major  
17       waterfront improvements" on the Den Dulk or  
18       Coleman Park areas. Therefore, the project is  
19       consistent with this policy, period.

20              Insert: nevertheless, then continue as  
21       it was phrased: Duke will dedicate to the City,  
22       insert, a public use easement over, and then  
23       continue to the end of the sentence.

24              And in the next sentence, the sentence  
25       would read: The City could then determine the best



1 uses for the, insert Coleman Park, and continues  
2 to the end.

3 MR. ELLISON: Okay, just for the sake of  
4 clarity, would you reread that portion of the  
5 table, the basis for consistency under land use  
6 64.1 as it would read with the corrections you  
7 just made?

8 MR. MARCKWALD: Yes. Duke is not  
9 proposing, quote, "major waterfront improvements"  
10 close quote, on the Den Dulk or Coleman Park  
11 areas. Therefore, the project is consistent with  
12 this policy. Nevertheless, Duke will dedicate to  
13 the City a public use easement over those portions  
14 of the Den Dulk property that are adjacent to the  
15 Coleman Park. The City could then determine the  
16 best uses for the Coleman Park property,  
17 consistent with local LORS.

18 MR. ELLISON: Does that complete your  
19 corrections --

20 MR. MARCKWALD: That completes --

21 MR. ELLISON: -- and clarifications?

22 MR. MARCKWALD: It does.

23 MR. ELLISON: With those corrections are  
24 the facts set forth in exhibit 185 true to the  
25 best of your knowledge?

1 MR. MARCKWALD: They are.

2 MR. ELLISON: And are the opinions,  
3 answering on behalf of the panel, are the opinions  
4 set forth therein your best professional judgment?

5 MR. MARCKWALD: They are.

6 MR. ELLISON: And do you and the other  
7 members of the panel adopt this as your testimony  
8 on land use in this proceeding?

9 MR. MARCKWALD: I do.

10 MR. ELLISON: Mr. Marckwald, could you  
11 summarize how you and the rest of the panel went  
12 about analyzing the land use issues associated  
13 with this application?

14 MR. MARCKWALD: Yes. In looking at the  
15 proposed project we compared it to the local  
16 plans, policies and ordinances that control the  
17 project, both for the City of Morro Bay and for  
18 the County of San Luis Obispo.

19 There are policies and programs that are  
20 very specific to the project site; and there are  
21 broader policies and programs that are more  
22 broadly applicable to general developments, both  
23 within the City of Morro Bay and also within the  
24 County. And we made the comparison on both  
25 processes.

1 MR. ELLISON: Having made that  
2 comparison, did you reach a conclusion regarding  
3 the compliance of the proposed project with all  
4 the applicable standards of either the City or the  
5 County?

6 MR. MARCKWALD: Yes. We came to the  
7 conclusion the project is consistent with all  
8 applicable LORS of both the City of Morro Bay as  
9 well as the County of San Luis Obispo.

10 MR. ELLISON: Okay. And for that  
11 matter, did you reach -- are there any other  
12 applicable LORS, other than those of the County  
13 and the City with respect to land use?

14 MR. MARCKWALD: Yes, there are  
15 applicable state statutes, as well. And they were  
16 reviewed and similarly the project is found,  
17 determined to be consistent with them, as well.

18 MR. ELLISON: Thank you. Did you also  
19 review the project to determine whether, in the  
20 area of land use, it would cause a significant  
21 adverse environmental impact within the meaning of  
22 CEQA?

23 MR. MARCKWALD: We did.

24 MR. ELLISON: And what was your  
25 conclusion with respect to that question?

1           MR. MARCKWALD: And our conclusion is  
2           that it would not cause a significant adverse  
3           impact within the meaning of CEQA when the project  
4           was constructed, consistent with the conditions of  
5           certification that are proposed in the CEC Staff's  
6           FSA.

7           MR. ELLISON: Did you also review the  
8           project to determine whether, in combination with  
9           other foreseeable projects it might have a  
10          cumulative impact within the meaning of CEQA?

11          MR. MARCKWALD: We did.

12          MR. ELLISON: And what was your  
13          conclusion regarding that question?

14          MR. MARCKWALD: We reached the same  
15          conclusion that the project would not have  
16          significant adverse impacts.

17          MR. ELLISON: Have you had an  
18          opportunity to review the land use portions of the  
19          final staff assessment?

20          MR. MARCKWALD: I have.

21          MR. ELLISON: And do you concur with the  
22          staff's conclusions regarding compliance with  
23          LORS?

24          MR. MARCKWALD: Yes, I do.

25          MR. ELLISON: And do you concur with the

1 staff's conclusions regarding the significance of  
2 environmental impacts, both individually and  
3 cumulatively?

4 MR. MARCKWALD: Yes, I do.

5 MR. ELLISON: A question has come up in  
6 the prefiled testimony regarding the final staff  
7 assessment's position with regard to compliance  
8 with LORS, and specifically whether in order to  
9 conclude compliance whether it is necessary to  
10 consider a conveyance of property by Duke to the  
11 City of Morro Bay.

12 Are you familiar with that issue?

13 MR. MARCKWALD: Yes, I am.

14 MR. ELLISON: Can you comment on your,  
15 having just commented upon your concurrence with  
16 the staff's conclusion in the FSA, I'd like to ask  
17 you what is your understanding of the FSA's  
18 position with regard to whether conveyance of  
19 property to the City of Morro Bay is a condition  
20 necessary to reaching a conclusion that the  
21 project is in compliance?

22 MR. MARCKWALD: It's my opinion that the  
23 staff did not rely on conveyance of property to  
24 the City of Morro Bay by Duke.

25 MR. ELLISON: Would you describe briefly

1       what it is in the FSA and the laws applicable to  
2       this project that causes you to interpret the FSA  
3       in that way?

4               MR. MARCKWALD:  The staff concluded on  
5       page 1.3, I believe, that the project would be  
6       fully consistent provided that the conditions of  
7       certification were adopted.

8               When I looked at the conditions of  
9       certification there is nothing in the conditions  
10      of certification that articulate the conveyance of  
11      property by Duke to the City as a condition.

12              Furthermore, there's a statement in the  
13      FSA at page 3-9 which is clear that the staff was  
14      not relying on any of the elements of the  
15      agreement to lease to reach its conclusion with  
16      respect to consistency.

17              But based on those items I concluded  
18      conveyances were not anticipated and certainly not  
19      compelled in the staff's mind in order to reach  
20      compliance with all of the applicable LORS.

21              MR. ELLISON:  Is it not correct,  
22      however, that the staff in the FSA refers to  
23      dedication of the Den Dulk property as well as  
24      Coleman Park property?

25              MR. MARCKWALD:  The FSA does use the

1 term dedication. And I believe that it's my  
2 interpretation, and it's my opinion that  
3 dedication in that instance refers to dedication  
4 of the public use easement that is part of the  
5 Commission's responsibility under section 25529 of  
6 the Warren Alquist Act, to make, as a condition of  
7 certification, an area be established for public  
8 use, as determined by the Commission.

9 The applicant has the responsibility to  
10 do that. And in making that area available for  
11 public use, the applicant may dedicate such public  
12 use zone to an agency. But there's nothing in the  
13 Warren Alquist Act, but for using the same term,  
14 dedicate, that compels a conveyance of property  
15 outright.

16 MR. ELLISON: And is there a condition  
17 of certification that accomplishes the dedication  
18 requirement that you just described?

19 MR. MARCKWALD: Yes, that would be land-  
20 2.

21 MR. ELLISON: And again, is there  
22 anything in that condition of certification that  
23 requires conveying the property, as opposed to  
24 dedicating it with the meaning that you just  
25 described?

1 MR. MARCKWALD: No, there is not.

2 MR. ELLISON: And so it's with that  
3 understanding of the FSA that you stated that you  
4 concur with its conclusions, is that correct?

5 MR. MARCKWALD: That is correct.

6 MR. ELLISON: The FSA also has a  
7 statement regarding a number of acres that Duke  
8 would set aside as compensation for habitat. This  
9 is a biology issue primarily, and I'm not going to  
10 ask you to testify to biology issues, but since it  
11 does appear in the land use testimony, could you  
12 comment upon your understanding of whether that  
13 characterization in the FSA is correct?

14 MR. MARCKWALD: Yes. This arises on  
15 page 3-22 of the FSA and it is in the second line  
16 of the second indented paragraph or italicized  
17 paragraph. And the FSA reads: Duke is currently  
18 in consultation with state and federal resources  
19 agencies regarding the impacts to about 4.5 acres  
20 of sensitive dune scrub habitat located within the  
21 area south of Morro Bay between Morro Strand Beach  
22 and the western property boundary of the MBPP  
23 property (former Den Dulk property).

24 As I understand the direct impacts for  
25 the project as proposed, it would be .33 acres.



1 And what is being discussed with the land  
2 management agencies is the appropriateness of  
3 placing a conservation easement on the balance of  
4 the Den Dulk as one of several possible  
5 mitigations for that purposes.

6 But I'm not aware of it anywhere that  
7 there's been a discussion about impacts to 4.5  
8 acres; but rather the 4.5 acres are being  
9 considered for a conservation easement to offset  
10 the .33 acres of direct impacts.

11 MR. ELLISON: Have you had an  
12 opportunity to review the conditions of  
13 certification in the FSA?

14 MR. MARCKWALD: Yes, I have.

15 MR. ELLISON: Do you have any proposed  
16 changes to those conditions?

17 MR. MARCKWALD: Yes. They were noted in  
18 our testimony on page 13. The first suggested  
19 change to the conditions of certification is on  
20 land-3. And I'll just read the portion of it that  
21 we're proposing a change:

22 Prior to the start of site mobilization  
23 insert associated with the construction of the new  
24 generation facility (not to include site  
25 mobilization for the tank far demolition).

1           The purpose in this condition goes to  
2     the offsite construction and laydown and parking  
3     facilities. They will not be used until later on  
4     in the process and we felt that the timing  
5     shouldn't be tied to tank farm demolition, but  
6     should be actually tied to the actual use of that  
7     location.

8           Alternatively, if instead of inserting  
9     the words I've suggested, to insert the same  
10    outcome could be accomplished by merely inserting  
11    the word offsite in front of site mobilization, so  
12    that it would then: Prior to the start of insert  
13    offsite site mobilization, and then continuing on  
14    with the original proposal of staff. Either would  
15    accomplish the outcome that we think is  
16    appropriate.

17          With respect to land-4, we believe that  
18    it needed to take into account there could be  
19    unforeseen circumstances that would arise, in  
20    which case we would need to close the bridge over  
21    Morro Creek for more than 24 hours, and simply  
22    would suggest adding, as the page 13 of the  
23    testimony does, except in the case of an  
24    unforeseen event that requires limiting the access  
25    to protect the public health and safety.

1           Finally on land-5, a simple insert on  
2           the fourth line down, parking areas and staging.  
3           Parking areas and laydown staging areas to the CPM  
4           and the applicable departments of San Luis Obispo  
5           County and the Executive Director of the Coastal  
6           Commission, if applicable, for further review and  
7           comment.

8           And those complete the suggested changes  
9           in conditions.

10          MR. ELLISON: So with those changes are  
11          the conditions of certification appropriate in  
12          your opinion?

13          MR. MARCKWALD: They are.

14          MR. ELLISON: Do you have a copy of the  
15          testimony on land use filed by the City of Morro  
16          Bay, specifically the testimony of Robert W.  
17          Schultz?

18          MR. MARCKWALD: Yes, I do.

19          MR. ELLISON: Do we need to mark this?

20          MR. ELIE: It's already marked, it's  
21          173.

22          MR. ELLISON: Sorry, 173? Thank you.

23          MR. ELLISON: Now, depending upon which  
24          copy you have, there are different page numbers  
25          here. So I will give my page numbers and

1        hopefully they are reflected for most of the  
2        people who are following along.

3                At my page 3, under the topic of zoning  
4        compliance, although I understand it may be on  
5        page 5 on some other copies, there is sentence  
6        and then a series of bullets. The sentence  
7        beginning at the top of a paragraph: Without  
8        considering the agreement to lease, the public  
9        benefits from construction of the MBPP include:  
10       and then there are a series of bullets.

11               Do you see that, Mr. Marckwald?

12               MR. MARCKWALD: I do.

13               MR. ELLISON: Is this, in your judgment,  
14       a complete list of the public benefits from the  
15       construction of the Morro Bay Power plant that are  
16       better than those that are in the agreement to  
17       lease?

18               MR. MARCKWALD: No, it is not.

19               MR. ELLISON: Could you describe the  
20       additional public benefits other than those in the  
21       agreement to lease?

22               MR. MARCKWALD: Yes. I think the  
23       demolition of the existing tank farm, the  
24       construction of a permanent bridge across Morro  
25       Creek, and a roadway that will serve for emergency

1 access and well as expanded coastal access; the  
2 system of bicycle/pedestrian pathways, as well as  
3 the endowment of that to make sure that there is  
4 proper repairs and maintenance during the  
5 project's life; the reduction of noise from the  
6 new facility, from the current facility; the  
7 reductions in water use; the construction jobs  
8 that would be associated with the new facility;  
9 the local purchasing program on an order of \$10  
10 million locally purchased materials.

11 There are also additional revenues to  
12 the City of Morro Bay in the neighborhood of  
13 \$600,000; a million dollars to the County, as well  
14 as \$1.6 million to the school districts.

15 I think those are some additional public  
16 benefits, and I may have missed some that are  
17 there. But right away those seem to some that are  
18 not included in this list.

19 MR. ELLISON: Thank you. Following the  
20 bullets Mr. Schultz testifies, quote: Based  
21 solely on the benefits to the City enumerated  
22 above, and without considering additional benefits  
23 conferred by the agreement to lease, there is not  
24 enough evidence to conclude that, quote, "greater  
25 than normal public benefits" will be achieved

1 through construction of the MBPPP.

2 Do you see that?

3 MR. MARCKWALD: I do.

4 MR. ELLISON: First of all, let me ask  
5 you, in your opinion is it necessary to make a  
6 greater than normal public benefits finding to  
7 permit the power plant and the stacks associated  
8 with it?

9 MR. MARCKWALD: I don't believe it is  
10 necessary to make that finding.

11 MR. ELLISON: Could you describe briefly  
12 why you believe that?

13 MR. MARCKWALD: Yes. The finding would  
14 only be made if, in fact, the height limitation  
15 was found to apply to the replacement of the power  
16 plant. And very clearly in the zoning ordinance  
17 the table that appears on page 37 of the zoning  
18 ordinance dated September 25, 1975 for 17.24.150  
19 coastal dependent industrial, which this is the  
20 zoning for the power plant, for maximum building  
21 height there is a description of 30 feet (for new  
22 construction only). Does not apply to the  
23 replacement or repair of existing structures.

24 And in my opinion this is clearly a  
25 replacement of an existing structure, and thus

1 Duke does not have to reach, or the CEC standing  
2 in the shoes of the City does not have to reach  
3 the greater than normal public benefits test.

4 MR. ELLISON: Notwithstanding that  
5 opinion, without considering anything other than  
6 the public benefits you've just described, which  
7 do not include the benefits of the agreement to  
8 lease, in your opinion could the Energy Commission  
9 make a greater than normal public benefits  
10 finding?

11 MR. MARCKWALD: Definitely, it could.  
12 It could, and in fact in the FSA, it does.

13 MR. ELLISON: The staff does?

14 MR. MARCKWALD: The staff does in the  
15 FSA.

16 MR. ELLISON: Mr. Schultz also testifies  
17 regarding the application of a number of City  
18 policies with respect to the power plant. Your  
19 prefiled testimony goes into great detail  
20 regarding a number of those policies, but I would  
21 like to ask you about five of them.

22 First of all, let me ask you what is  
23 your opinion regarding the project's conformance  
24 to general plan objective number one?

25 MR. MARCKWALD: I believe the project

1 definitely complies with general plan objective  
2 number one.

3 MR. ELLISON: Can you summarize what  
4 that objective is and why you believe that the  
5 project complies with it?

6 MR. MARCKWALD: The objective is found  
7 on Roman II-58 of the City of Morro Bay's general  
8 plan 1988 is to improve the quality of life for  
9 all Morro Bay citizens, especially in regard to  
10 health care, housing, employment, recreation,  
11 business and education.

12 The new project will be smaller,  
13 quieter, use less water, open up views, increase  
14 coastal access. All these things go to improving  
15 the quality of life of the citizens of Morro Bay.

16 MR. ELLISON: And could you discuss the  
17 project's conformance with general plan policy LU-  
18 20?

19 MR. MARCKWALD: LU-20 is found on Roman  
20 II-62 of the same document. It says the City  
21 should explore all means to maintain and encourage  
22 the development of harbor-related land uses along  
23 the Embarcadero.

24 Opportunities for such forms of  
25 development should be given priority over those



1       that are not dependent on waterfront locations or  
2       related to the public's use and enjoyment of this.

3               There's nothing that is part of the  
4       project that would prevent the City from exploring  
5       additional means, and in fact, the improvements to  
6       the facade and the intake structure would actually  
7       advance this policy.

8               MR. ELLISON: Same question with regard  
9       to general plan program LU-20.1.

10              MR. MARCKWALD: That reads, on page 64  
11       of the same document: Harbor-related land uses  
12       should include marine retail service and repair  
13       businesses, fish distribution, wholesale and  
14       retail sales, water recreation related, sports  
15       fishing businesses, public uses related to the  
16       waterfront or the harbor and marine science and  
17       research establishments.

18              I think my testimony is that  
19       particularly with respect to the public uses by  
20       expanding the system of pedestrian trails and bike  
21       trails the project will definitely improve those  
22       public uses and access and coastal access.

23              MR. ELLISON: Same question with regard  
24       to LU-20.2.

25              MR. MARCKWALD: And that says the

1 redevelopment of existing land uses are not in  
2 keeping with this objective -- excuse me, let me  
3 rephrase that -- redevelopment of existing land  
4 uses not in keeping with this objective should not  
5 be encouraged.

6 And it is my opinion that what we are  
7 doing is in keeping with the objective and in no  
8 way frustrates it.

9 MR. ELLISON: And lastly, the same  
10 question with regard to general plan policy LU-64,  
11 as well as CLUP-7.06.

12 MR. MARCKWALD: You said LU-64?

13 MR. ELLISON: That's correct, LU-64 and  
14 the coastal land use plan policy 7.06.

15 MR. MARCKWALD: Take a moment to --

16 (Pause.)

17 MR. MARCKWALD: Policy 7.6 states that a  
18 precise development plan for the area located in  
19 the Coleman-Den Dulk area shown on figure 9 and  
20 designated Marrack precise development plan area  
21 shall be prepared by the City.

22 The City may request assistance of the  
23 Coastal Conservancy or other appropriate state  
24 agency to help prepare such a plan. And such  
25 development plan is a priority improvement project

1 for public funding. The precise development plan  
2 would include, but not be limited to, the  
3 following standards and procedures.

4 And it details a variety of determine  
5 the commercial fishing and coastal dependent needs  
6 and examine the feasibility of accommodating the  
7 needs for major waterfront improvements on the Den  
8 Dulk, development of -- I'm going to just  
9 paraphrase it, if I may, the major objectives --  
10 development the detailed waterfront improvement  
11 plan, development and implement a plan for onsite  
12 dune stabilization, provide a public parking in  
13 appropriate locations outside of the viewsheds,  
14 development of cost benefit study and funding  
15 program, develop a part of the overall development  
16 plan and evaluation of proposed water use,  
17 historic water use, use for commercial fishing.

18 None of these, the proposed project is  
19 consistent with this policy in that none of the  
20 things that we are doing would in any way affect  
21 the City's ability to prepare this plan and  
22 evaluate these uses.

23 MR. ELLISON: Your description of how  
24 you went about analyzing land use issues, you  
25 discuss the fact that there are policies specific

1 to the power plant site. And then there are also  
2 policies that are generally applicable to  
3 development within the City.

4 Do I correctly recall your testimony?

5 MR. MARCKWALD: You do.

6 MR. ELLISON: The policies that we've  
7 been discussing fall under the latter category,  
8 that is these are general policies applicable to  
9 development in the City, is that correct?

10 MR. MARCKWALD: Yes, they are.

11 MR. ELLISON: Could you briefly describe  
12 what the policies that are specific to the power  
13 plant site are, and whether the project conforms  
14 to them?

15 MR. MARCKWALD: Yes. The policy 5.01  
16 found on page 115 of the Morro Bay coastal land  
17 use plan is -- specifically says the City shall  
18 designate the existing PG&E parcel and the Chevron  
19 pier parcel as coastal dependent industrial uses.  
20 Any proposals for energy dependent industrial uses  
21 within zones designated for general industrial  
22 development will require an amendment to the land  
23 use plan consistent with section 30510 of the  
24 Coastal Act.

25 Power plant expansion on the PG&E-owned

1 property shall have priority over other coastal  
2 dependent industrial uses. Power plant expansion  
3 shall be limited to small facilities whose  
4 location would not further affect the views of  
5 Morro Rock from State Highway 1 and high visitor  
6 serving areas consistent with policy 12.11.

7 Clearly Duke's proposed project is  
8 consistent with this policy. While it's not an  
9 expansion, and it is a replacement, nonetheless  
10 the replacement project will have the benefits of  
11 protecting and enhancing the visitor-using areas,  
12 as well.

13 MR. ELLISON: And is the replacement  
14 project, quote, small, unquote within the meaning  
15 of that policy?

16 MR. MARCKWALD: It is my opinion that it  
17 is, yes.

18 MR. ELLISON: That's all I have. That  
19 panel's available for examination.

20 We certainly, at the Committee's  
21 discretion, if this is the appropriate time we  
22 would move the admission of exhibit, I believe  
23 it's 185. And all of the exhibits that are  
24 identified as incorporated by reference therein,  
25 beginning at page 3 and continuing to page 4 of

1 exhibit 185.

2 HEARING OFFICER FAY: Mr. Ellison, could  
3 you at least list the exhibit numbers of those  
4 exhibits you're relying on --

5 MR. ELLISON: Certainly, I'm reading  
6 from page 3 and 4 of the prefiled testimony.  
7 Exhibit number 4, exhibit 19 -- I'll just read the  
8 numbers -- 22, 36, 37, 154, 76, 34, 90, 59, 75  
9 with the correction we made earlier, 87, 102, 49,  
10 155 and 95.

11 HEARING OFFICER FAY: Is there  
12 objection?

13 MR. ELIE: No objection.

14 HEARING OFFICER FAY: Okay. I hear  
15 none, so moved.

16 Does the staff have any cross-  
17 examination of the panel?

18 MS. HOLMES: We do not.

19 HEARING OFFICER FAY: Okay. How about  
20 the City of Morro Bay?

21 MR. ELIE: Briefly.

22 CROSS-EXAMINATION

23 BY MR. ELIE:

24 Q Mr. Marckwald, if you could look at your  
25 testimony, page 13, you've suggested addition to

1 land-4. Do you have that in front of you?

2 MR. MARCKWALD: I do.

3 MR. ELIE: Is Duke amenable to a small  
4 modification to that language to state at the end  
5 of the sentence, as determined by the CPM? In  
6 other words, the CPM would be the one to determine  
7 whether public health and safety require that  
8 limited access?

9 MR. MARCKWALD: If I could just have a  
10 moment to confer?

11 MR. ELIE: Sure.

12 (Pause.)

13 MR. MARCKWALD: That would be fine with  
14 Duke.

15 MR. ELIE: Thank you. Next if you could  
16 turn to Mr. Schultz' testimony again, which is  
17 exhibit 173, and specifically on my copy, page 6,  
18 which is the recommendation. Do you agree with  
19 the recommended condition of certification  
20 requiring the project owner to implement the  
21 listed sections and provisions of the agreement to  
22 lease, which is exhibit 95 in these proceedings?

23 MR. MARCKWALD: I'm going to have Mr.  
24 Van Buskirk handle this question.

25 MR. VAN BUSKIRK: Thank you,

1 Mr. Marckwald. As Mr. Marckwald knows, I was part  
2 of the negotiations for some of these conditions.

3 The answer to the question directly, the  
4 additional conditions suggested, beginning with  
5 outfall lease, is that what you mean, counsel?

6 MR. ELIE: As a condition of  
7 certification the project owner shall implement  
8 the following provisions of the agreement to  
9 lease, et cetera. It's on page 6, it's the  
10 recommended condition of certification.

11 MR. VAN BUSKIRK: I see it, thank you.  
12 No, we would not agree with that.

13 MR. ELIE: Why not?

14 MR. VAN BUSKIRK: Because it contains  
15 many elements. First of all, it is not a  
16 recommendation in the FSA by the staff. And the  
17 staff did not find it necessary to recommend these  
18 matters in order for the project, either to  
19 achieve consistency with the general plan, or  
20 coastal land use plan; or to make a finding of  
21 greater than normal benefits, assuming one was  
22 needed.

23 And the staff conditions, we feel, are  
24 sufficient, together with the features of the  
25 project, to achieve consistency.



1           Many of the items in here are simply  
2 matters of commercial negotiation in between the  
3 City and Duke, in respect to the agreement to  
4 lease. And in our opinion -- in my opinion, are  
5 unnecessary to achieve LORS consistency. And  
6 would be inappropriate in the license as  
7 conditions.

8           MR. ELIE: Nothing further.

9           HEARING OFFICER FAY: CAPE.

10          MS. CHURNEY: Yes.

11                   CROSS-EXAMINATION

12 BY MS. CHURNEY:

13           Q     Mr. Marckwald, Duke has concluded that  
14 the project, the Morro Bay Power Plant project  
15 will be fully consistent with all local land use  
16 plans, ordinances and policies. And I didn't see  
17 any discussion by Duke of compliance with land use  
18 policy 5.22.

19                   Did you consider that land use policy  
20 before reaching your conclusion?

21           MR. MARCKWALD: Yes, we did.

22           MS. CHURNEY: And are you aware that  
23 emission levels for both PM10 and SO2 will  
24 increase with the new power plant?

25           MR. ELLISON: I'm going to object to

1       that question as assuming facts not in evidence.

2               MS. CHURNEY: Well, it goes to whether  
3       the power plant will be in compliance with this  
4       land use policy.

5               MR. ELLISON: The objection wasn't  
6       relevance, it was the statement, the question  
7       assumes facts which are --

8               MS. CHURNEY: I asked him --

9               MR. ELLISON: -- at odds with the  
10      testimony.

11              MS. CHURNEY: I'm sorry. I asked him if  
12      he was aware that emission levels for PM10 and SO2  
13      will increase with the new power plant.

14              HEARING OFFICER FAY: We're going to  
15      sustain the objection. This is not an air quality  
16      witness.

17              MS. CHURNEY: Well, this land use policy  
18      does deal with air quality emissions, and I think  
19      I'm entitled to know how he arrived at the  
20      conclusion apparently that this land use policy  
21      won't be violated.

22              MR. ELLISON: If you want to ask the  
23      question that you just asked, that you just posed,  
24      I would not object to that, how he arrived at that  
25      conclusion. I think it's a fair question.

1 MS. CHURNEY: Do you have the question  
2 in mind, Mr. Marckwald?

3 MR. MARCKWALD: Could you repeat it?

4 MS. CHURNEY: Yes. How did you arrive  
5 at your conclusion that land use policy 5.22 will  
6 not be violated by the new Morro Bay Power Plant?

7 MR. MARCKWALD: Because the new Morro  
8 Bay Power Plant will conform with all applicable  
9 standards of federal and state air pollution  
10 control requirements.

11 MS. CHURNEY: But doesn't that land use  
12 policy also require that emission levels be  
13 maintained?

14 MR. MARCKWALD: The principal  
15 requirement is to comply with the standards; and  
16 in complying with the standards I determined that  
17 the plant would conform with this policy.

18 MS. CHURNEY: So you didn't, in your  
19 analysis, didn't consider the last portion of that  
20 land use plan policy that emission levels be  
21 maintained?

22 MR. ELLISON: Objection, that was not  
23 his testimony.

24 HEARING OFFICER FAY: I'm going to  
25 short-circuit this a little bit if I may.

1           Mr. Marckwald, did you rely on Mr.  
2 Rubenstein's expertise or any other of the air  
3 quality experts in deciding that that policy would  
4 be met?

5           MR. MARCKWALD: I did.

6           HEARING OFFICER FAY: Thank you.

7           MS. CHURNEY: And did Mr. Rubenstein  
8 tell you that PM10 levels would be increasing by  
9 76 tons per year in his discussions with you about  
10 that issue?

11          MR. MARCKWALD: He did not -- no, he did  
12 not.

13          MS. CHURNEY: Turning to page 9 of the  
14 prefiled testimony, it indicates that Duke  
15 recognizes and agreement that the plain meaning of  
16 the term expansion, as used to describe an  
17 increase in size or mass of a structure, do you  
18 see that on page 9?

19          MR. MARCKWALD: I do.

20          MS. CHURNEY: Do you agree with that  
21 definition?

22          MR. MARCKWALD: Yes, I do.

23          MS. CHURNEY: The size of the footprint  
24 of the new plant increases from 9.61 acres to 14  
25 acres, is that correct?

1 MR. ELLISON: Counsel, could you  
2 describe more precisely when you say footprint,  
3 what you mean?

4 MS. CHURNEY: The acreage occupied by  
5 the new plant versus acreage occupied by the old  
6 plant of buildings and attendant structures.

7 MR. ELLISON: The reason I'm asking the  
8 question is because I'm concerned about ambiguity  
9 in the question regarding exactly what attendant  
10 structures are. For example, the bridge.

11 MS. CHURNEY: I think this is defined  
12 and described, and maybe you might want to flip to  
13 FSA part two, page 3-10.

14 Do you see where it's described there on  
15 page 3-10?

16 MR. MARCKWALD: 3-10.

17 MS. CHURNEY: Of the FSA.

18 MR. MARCKWALD: Correct.

19 MS. CHURNEY: And it states that the  
20 acreage of the existing power generation facility  
21 footprint is 9.61 acres, and includes the power  
22 plant buildings, transformers, stacks, shop,  
23 warehouse and office buildings and parking.

24 And then it states that the acreage of  
25 the proposed facility is approximately 14 acres.

1 And the new facility's acreage includes power  
2 plant equipment and structures, transformer,  
3 combined cycle units, heat recovery steam  
4 generators, gas turbine generator enclosure,  
5 administrative/warehouse and control buildings,  
6 substation, soundwall and a transmission corridor  
7 to the existing PG&E electric substation.

8 MR. MARCKWALD: Correct.

9 MR. ELLISON: Counsel, just so we have a  
10 very clear record here, let me ask you a question.  
11 When you say footprint of the existing plant are  
12 you including the tanks?

13 MS. CHURNEY: Pardon me?

14 MR. ELLISON: When you say footprint of  
15 the existing plant are you including the tanks?

16 MS. CHURNEY: Well, it includes -- I'm  
17 using it in the sense that it's been used by  
18 staff, so it includes everything that staff  
19 indicates it includes.

20 MR. ELLISON: Okay, thank you.

21 MS. CHURNEY: Going back to my question.

22 MR. MARCKWALD: Yes.

23 MS. CHURNEY: The size of the footprint  
24 of the new plant increases from 9.61 acres to 14  
25 acres, is that correct?

1 MR. MARCKWALD: That is correct.

2 MS. CHURNEY: And would you agree using  
3 the definition of expansion that you just  
4 indicated you agreed with, that that is an  
5 increase in size?

6 MR. MARCKWALD: That is an increase in  
7 size; it's certainly not an increase in mass.

8 MS. CHURNEY: Now, on page 10 of the  
9 prefiled testimony it states that the  
10 modernization of the existing plant facility  
11 provides a cleaner, quieter and more efficient  
12 power generation. The project will not be  
13 detrimental --

14 MR. MARCKWALD: Excuse me, counsel, can  
15 you tell me where you are?

16 MS. CHURNEY: Yeah, it's -- looks like  
17 the second paragraph, second sentence.

18 MR. MARCKWALD: Got it.

19 MS. CHURNEY: And it states: The  
20 modernization of the existing plant facility  
21 provides a cleaner, quieter and more efficient  
22 power generation. The project, therefore, will  
23 not be detrimental to the health, and it goes on.

24 My question is, first of all, Mr.  
25 Marckwald, did you prepare this part of the

1 prefiled testimony?

2 MR. MARCKWALD: Yes, I did.

3 MS. CHURNEY: And when you prepared it  
4 were you aware that Duke's AFC shows that the new  
5 plant will produce 76 more tons of PM10 per year?

6 MR. MARCKWALD: I was aware there was a  
7 brief increase in -- and increase in PM10, yes.

8 MS. CHURNEY: And were you also aware  
9 that there will be an increase in SO2?

10 MR. MARCKWALD: Yes.

11 MS. CHURNEY: So would you agree that  
12 based on the AFC the new power plant will not be  
13 cleaner, at least in those respects, in PM10 and  
14 SO2?

15 MR. MARCKWALD: I would not agree with  
16 your statement. The new project, on balance, is  
17 cleaner than the existing plant.

18 MS. CHURNEY: That wasn't my question.  
19 My question is with respect solely to those two  
20 pollutants, PM10 and SO2, is it a correct  
21 statement that the new plant will not be a cleaner  
22 plant?

23 MR. MARCKWALD: That is true.

24 MS. CHURNEY: Were you also aware when  
25 you prepared this testimony that -- actually you



1 may not have been because I believe this testimony  
2 occurred subsequent to the preparation of this --  
3 but Duke's expert, Mr. Mantey on noise, testified  
4 at the last hearing that the new plant will be  
5 imperceptibly louder than the old plant at night.  
6 Were you made aware of that after the fact?

7 MR. MARCKWALD: I was --

8 MR. ELLISON: Counsel, Mr. Mantey's  
9 testimony assumed a specific hypothetical, and for  
10 the record I think we need to clarify what that  
11 was.

12 He said, first of all, you are correct  
13 in saying he said imperceptibly louder. But  
14 secondly, the assumption was that the new plant is  
15 running 100 percent flat-out, and the comparison  
16 was to the existing plant, ramped down at night.

17 MS. CHURNEY: Well, --

18 (Parties speaking simultaneously.)

19 MS. CHURNEY: -- I accept that --

20 MR. ELLISON: -- that's what Mr.  
21 Mantey's testimony was?

22 MS. CHURNEY: There's no limitation to  
23 prevent the new plant from running 100 percent at  
24 night to my understanding.

25 MR. ELLISON: I just want to be clear

1       when you characterize the testimony, we can either  
2       refer to the transcript, or you and I can have the  
3       discussion we're having, but when you put to a  
4       witness a characterization of another witness'  
5       testimony, it is important, in my view, that it be  
6       accurate. That is my recollection of what the  
7       testimony was, and I believe that's correct. Do  
8       you agree?

9               MS. CHURNEY: I believe that you've  
10       described it accurately.

11              MR. ELLISON: Okay.

12              MR. MARCKWALD: So, could you repeat  
13       your question?

14              MS. CHURNEY: Yes. Were you made aware  
15       of that testimony after you prepared this written,  
16       prefiled testimony?

17              MR. MARCKWALD: I was not.

18              MS. CHURNEY: Now, had you been aware of  
19       that would you make any changes to what you have  
20       filed, and in particular your statement that the  
21       new plant will be quieter?

22              MR. MARCKWALD: Again, the new plant, I  
23       would not make any changes to my testimony. The  
24       new plant, on balance, is substantially quieter  
25       than the old plant.

1 MS. CHURNEY: Again, that wasn't my  
2 question. My question was very specific with  
3 respect to the very specific testimony of Mr.  
4 Mantey, which I acknowledge, that in that  
5 hypothetical that the new plant would be running  
6 at 100 percent at night.

7 MR. MARCKWALD: Could you characterize  
8 his testimony again for me, counsel?

9 MS. CHURNEY: He testified that the new  
10 plant will be imperceptibly louder than the old  
11 plant given that situation.

12 MR. MARCKWALD: Then I would have put a  
13 caveat in saying that it would be quieter, except  
14 for those times that it was imperceptibly louder.

15 MS. CHURNEY: Thank you. I have no  
16 further questions.

17 HEARING OFFICER FAY: Okay. Any  
18 redirect, Mr. Ellison?

19 REDIRECT EXAMINATION

20 BY MR. ELLISON:

21 Q Mr. Marckwald, Ms. Churney asked you  
22 some questions about policy 5.22, do you recall  
23 those questions? This was the policy on whether  
24 air emissions are maintained.

25 MR. MARCKWALD: I do.

1                   MR. ELLISON: And she asked you to focus  
2 exclusively upon PM10 and SO2. What is your  
3 understanding of what the emissions overall,  
4 counting all emissions, from the project are  
5 maintained?

6                   MR. MARCKWALD: My understanding is that  
7 emissions overall from the project are maintained  
8 and decreased.

9                   MR. ELLISON: Was there anything in  
10 policy 5.22 that limits the policy to PM10 and  
11 SO2?

12                  MR. MARCKWALD: No, there is not.

13                  MR. ELLISON: Is it a fair reading of  
14 the policy that it applies to emissions generally?

15                  MR. MARCKWALD: It is.

16                  MS. CHURNEY: Well, I'd object. I mean  
17 I think that's a legal conclusion. I don't think  
18 he's qualified to make that legal conclusion.

19                  HEARING OFFICER FAY: Do you want to  
20 respond or rephrase the question?

21                  MR. ELLISON: I'll withdraw the  
22 question. The policy speaks for itself.

23                  Ms. Churney also asked you some  
24 questions regarding the footprint of the existing  
25 plant and the new plant, and whether that

1 footprint would qualify the facility as being an  
2 expansion. Do you recall those questions?

3 MR. MARCKWALD: Yes, I do.

4 MR. ELLISON: Is there anything in the  
5 City's policies that you know of that defines  
6 expansion as being measured by the footprint?

7 MR. MARCKWALD: No, there is not.

8 MR. ELLISON: And you have testified to  
9 your conclusion that this is a replacement and not  
10 an expansion. Could you just briefly summarize  
11 why that is your opinion?

12 MR. MARCKWALD: The proposed project is  
13 a replacement for the existing project. There is  
14 no -- the mass of the project is smaller; the  
15 location and the visual implications of the  
16 project are smaller; it is using -- it is on the  
17 same site; it's using the same fuels; it is a  
18 replacement as not only we have concluded, but  
19 also as the FSA notes, that it is clear -- the  
20 staff's conclusion is clearly that it is a  
21 replacement, not an expansion.

22 MR. ELLISON: That's all I have, thank  
23 you.

24 HEARING OFFICER FAY: Anything further  
25 from any of the parties?

1 MS. CHURNEY: Just one.

2 HEARING OFFICER FAY: Within the scope  
3 of the redirect?

4 MS. CHURNEY: Yes, just one follow up.

5 RECROSS-EXAMINATION

6 BY MS. CHURNEY:

7 Q Mr. Marckwald, there is nothing in the  
8 City's policy that you're aware of that would  
9 preclude the use of an increase in the size of the  
10 footprint in determining whether this project is  
11 an expansion, is there?

12 MR. MARCKWALD: Offhand, and without  
13 looking through all of them, I don't believe there  
14 is.

15 MS. CHURNEY: No further questions.

16 HEARING OFFICER FAY: All right, Mr.  
17 Ellison, I don't want to put you at a  
18 disadvantage, so if you need to follow up after my  
19 questions, you're welcome to. Just have a couple  
20 clarifications.

21 EXAMINATION

22 BY HEARING OFFICER FAY:

23 Q First of all for Mr. Van Buskirk, what  
24 is your legal view of the effect of including any  
25 elements of the agreement to lease into the

1 Commission's decision, assuming that there are any  
2 limits to the Commission's jurisdiction. And  
3 that's a hypothetical.

4 MR. VAN BUSKIRK: I understand. There  
5 are elements of the project, as proposed in the  
6 AFC. For example, the road, the bridge, et  
7 cetera. Those may also happen to be the subject  
8 of provisions in the separate agreement to lease  
9 between the City and Duke, the proposed agreement  
10 to lease, I should say.

11 And, of course, when they are elements  
12 of the project, per se, as proposed in the AFC and  
13 to the Commission, then the Commission studies  
14 them and adopts mitigation where necessary and  
15 conditions.

16 And that would be my understanding of  
17 what, in the land use area, of what you would have  
18 in lands-1 through -6 as recommended by your  
19 staff.

20 At the same time there are independent  
21 negotiations going on, for example, rent for a new  
22 outfall lease with the City, which have no  
23 bearing, as far as I can tell, on the agreement --  
24 excuse me, on the conditions of certification.

25 You have a proposed condition that there

1 be an outfall lease, as of course there has to be  
2 that ability, but what the rent is or isn't, as  
3 between Duke and the City, I would think would be  
4 inappropriate for inclusion because it's simply a  
5 commercial term on an independent matter, so to  
6 speak, between the City and Duke.

7           There's a long list of things like that.  
8 You will have a condition for a chief building  
9 official, CBO. The City wanted to have a project  
10 liaison officer of their own, you know, to work  
11 with the CBO, which is something they want. And  
12 the parties have discussed the possibility of Duke  
13 funding that, to a degree. And I don't see how  
14 that is, you know, part of the project.

15           Of the project it is construction and  
16 the enforcement of your conditions are taken care  
17 of by your CBO condition. So, there's a lot of  
18 them like that.

19           We could go one by one, but I do  
20 believe, you know, that we would take the view  
21 that many of those kind of things that are found  
22 in the agreement to lease would not be necessary  
23 to mitigate any impacts of the project as you look  
24 at it from a CEQA point of view.

25           And as Mr. Marckwald said, we include



1       within that the dedications of property, which  
2       Duke has discussed with the City, possibly making,  
3       you know, when the parties, I hope, come to terms  
4       on the agreement to lease.

5               HEARING OFFICER FAY: But if the  
6       Commission fails to include all those conditions  
7       that, in your view, lie outside the normal  
8       conditions of certification for a power plant,  
9       then is the City protected?

10              MR. VAN BUSKIRK: Well, the City is  
11       protected in its negotiating an agreement. But,  
12       as I understand your mission is to apply the  
13       Warren Alquist Act and, of course, CEQA along with  
14       that. And you are doing that, and will do that  
15       through your conditions.

16              I don't think, as part of -- and to  
17       determine consistency. And as we have just  
18       determined, or at least we take the position there  
19       is consistency without incorporating those items,  
20       when you look at the policies one by one and see  
21       what they say.

22              So, the fact that the City and Duke are  
23       negotiating for other things doesn't leave the  
24       City unprotected just because you don't include  
25       those things. The City is protected insofar as

1 the jurisdiction under the Warren Alquist Act and  
2 CEQA.

3 And besides that, how would the  
4 Commission, just hypothetically, get into the  
5 business of enforcing those things? Would you  
6 enforce the rental payments of the lease?

7 So, it strikes me that there are things  
8 that are definitely outside the purview of where  
9 you would go under the Warren Alquist Act and  
10 under CEQA to deal with the project as proposed.

11 HEARING OFFICER FAY: And if the  
12 Commission agrees with you, and the City and Duke  
13 have a dispute about something, for instance the  
14 amount paid for the outfall lease, then they have  
15 other recourse, do they not?

16 MR. VAN BUSKIRK: Well, obviously the  
17 City and Duke are in discussions with regard to  
18 the outfall lease. And I would be very hopeful  
19 and confident that those discussions will conclude  
20 in a favorable manner at some point, even though  
21 it's a difficult subject. But, of course, the  
22 City has the lease, the ability to lease, which,  
23 you know, is not within your jurisdiction. That's  
24 the City's jurisdiction.

25 And so the City has no lack of ability

1 to have a negotiating position vis-a-vis Duke, and  
2 doesn't need the Commission to protect it by  
3 adding extraneous measures to the conditions of  
4 certification.

5 HEARING OFFICER FAY: And, in fact,  
6 there are real estate negotiated arrangements that  
7 occur in California even without the Energy  
8 Commission's blessing, is that correct?

9 MR. VAN BUSKIRK: That's my  
10 understanding. And I think project applicants  
11 have to get the basic entitlements from someone  
12 other than the Commission if they want to build a  
13 power plant.

14 HEARING OFFICER FAY: Thank you.

15 MR. ELIE: Mr. Fay, I think maybe I need  
16 to make a couple quick clarification questions of  
17 Mr. Van Buskirk.

18 HEARING OFFICER FAY: Well, you can wait  
19 until I finish with my questions.

20 MR. ELIE: Oh, okay. Sorry.

21 HEARING OFFICER FAY: And then, Mr.  
22 Marckwald, what is the significance of Duke's  
23 position that the project is located outside of  
24 the quote, waterfront area, I guess as the City  
25 defines it? And I understand staff agrees with

1       you on that.

2               MR. MARCKWALD: The waterfront master  
3 plan has a set of design guidelines that apply to  
4 those facilities that are subject to it. So in  
5 Duke's case, the intake structure would be subject  
6 to it, but the plant site, itself, would not.

7               So that the significance is what is the  
8 standard that is to be applied.

9               HEARING OFFICER FAY: And the standard  
10 is different from a waterfront area?

11              MR. MARCKWALD: That's correct.

12              HEARING OFFICER FAY: And that would  
13 mean appearance and use that is consistent with a  
14 fishing village concept?

15              MR. MARCKWALD: That's correct.

16              HEARING OFFICER FAY: Okay, thank you.  
17 All right, The City will certainly have a chance  
18 to address anything that I brought up when they  
19 testify on land use.

20              But I do want to let the panel go  
21 because I know they have some constraints --

22              MR. ELIE: But I have --

23              HEARING OFFICER FAY: -- a problem.

24              MR. ELIE: -- two short questions that  
25 are follow-ups to what Mr. Van Buskirk testified

1 to in response to your question. So I don't know,  
2 it's --

3 HEARING OFFICER FAY: These are  
4 questions of him?

5 MR. ELIE: Correct.

6 HEARING OFFICER FAY: All right.

7 MR. ELIE: Directly, specifically based  
8 on the subject you raised.

9 HEARING OFFICER FAY: Go ahead.

10 MR. ELIE: Okay.

11 CROSS-EXAMINATION

12 BY MR. ELIE:

13 Q Mr. Van Buskirk, is it correct that if  
14 this Commission were to decide that the City is  
15 correct, that there's not enough evidence to  
16 conclude that greater than normal public benefits  
17 will be achieved with the construction of the  
18 plant, that portions of the agreement to lease  
19 could be incorporated by this Commission?

20 MR. VAN BUSKIRK: Well, it's a two-part  
21 answer. First, the finding of greater than normal  
22 benefits only comes into play if there is a need  
23 to vary the height standard found in the M2 zoning  
24 district. If there's no need to vary that  
25 standard, then the finding wouldn't come into play

1 at all.

2 MR. ELIE: For the purposes of my  
3 question you can assume that that has occurred,  
4 the finding has been made.

5 MR. VAN BUSKIRK: Okay, so would you  
6 repeat the question, then?

7 MR. ELIE: If the Commission were to  
8 decide that despite Duke's testimony there's not  
9 enough evidence to conclude that greater than  
10 normal public benefits will be achieved through  
11 construction of the project, would it not be  
12 appropriate for the Commission to, in fact,  
13 include portions of the agreement to lease?

14 MR. VAN BUSKIRK: Okay. If the height  
15 standard didn't apply and the Commission accepted  
16 the testimony of the City, basically, that  
17 notwithstanding the list of benefits Mr. Marckwald  
18 just testified to, that that wasn't enough, that  
19 that was not greater than normal, then your  
20 question was in that case does something else need  
21 to be added in order to give the greater than  
22 normal meaning things in the agreement to lease?  
23 Is that basically the question?

24 MR. ELIE: Correct, that's my question.

25 MR. VAN BUSKIRK: My answer to that is I

1 don't see how the Commission could come to that  
2 conclusion. But given your hypothetical, given  
3 your hypothetical --

4 MR. ELIE: Indulge me, it's my question.

5 MR. VAN BUSKIRK: Given your  
6 hypothetical, well, some are realistic, some are  
7 not, but given your hypothetical we'd have to look  
8 at each one of the measures you talk about.  
9 Because some of the measures may be completely  
10 beyond the Commission's jurisdiction to impose  
11 legally as a condition.

12 But, sure, if the Commission disagrees  
13 with the staff and with us, and agrees with the  
14 City that the list of benefits is too short to be  
15 greater than normal, and the Commission needs that  
16 finding in order to make a consistency  
17 adjudication, they will have to consider some  
18 additional benefits, I believe.

19 MR. ELIE: And isn't it also true that  
20 Duke has agreed, in fact, to incorporate certain  
21 portions of the agreement to lease in the  
22 conditions of certification?

23 MR. VAN BUSKIRK: In general, I think  
24 mostly those provisions that are part of the  
25 project anyway. In other words, certain things in

1 the agreement to lease are in the project, the  
2 road, the bridge, the whole long list of things.

3 And as to those, they've been submitted  
4 to the Commission as part of the project.

5 There are others that have not been  
6 proposed as part of the project.

7 MR. ELIE: So the answer to my question  
8 is yes?

9 MR. VAN BUSKIRK: Yes, with that  
10 explanation.

11 MR. ELIE: Thank you. Nothing further.

12 HEARING OFFICER FAY: Okay. Mr.  
13 Ellison, did you have any follow up?

14 MR. ELLISON: No.

15 HEARING OFFICER FAY: Okay. We thank  
16 your panel for its testimony. And I hope we've  
17 met your deadline for airline flights, et cetera.  
18 So if there's no questions from the Committee,  
19 then the panel is excused. Thank you.

20 It's 5:00 now. Ms. Holmes, can you give  
21 us some suggestions on would you like to go ahead.  
22 We have no more than an hour remaining.

23 MS. HOLMES: I think we're ready to  
24 proceed.

25 HEARING OFFICER FAY: Okay, proceed.



1 MS. HOLMES: Staff's witnesses in the  
2 area of land use are Mark Hamblin and Sue Walker,  
3 and they both need to be sworn.

4 HEARING OFFICER FAY: Please stand and  
5 will the court reporter please swear the  
6 witnesses.

7 Whereupon,

8 MARK HAMBLIN and SUSAN WALKER  
9 was called as a witness herein, and after first  
10 having been duly sworn, was examined and testified  
11 as follows:

12 DIRECT EXAMINATION

13 BY MS. HOLMES:

14 Q Did you prepare the land use sections of  
15 exhibit 143?

16 MR. HAMBLIN: Yes.

17 MS. WALKER: Yes.

18 MS. HOLMES: And was a statement of your  
19 qualifications included therein?

20 MR. HAMBLIN: Yes.

21 MS. WALKER: Yes.

22 MS. HOLMES: And are the facts contained  
23 in that testimony true and correct to the best of  
24 your knowledge?

25 MR. HAMBLIN: Yes.

1 MS. WALKER: Yes.

2 MS. HOLMES: And does the testimony  
3 represent your best professional judgment?

4 MR. HAMBLIN: Yes.

5 MS. WALKER: Yes.

6 MS. HOLMES: And do you adopt this as  
7 your testimony today?

8 MR. HAMBLIN: Yes.

9 MS. WALKER: Yes.

10 HEARING OFFICER FAY: Excuse me, Ms.  
11 Holmes. I wonder if the City would loan the  
12 microphone --

13 MS. HOLMES: Might be easier.

14 HEARING OFFICER FAY: Thank you.

15 MS. HOLMES: Thank you.

16 During the earlier section of the  
17 hearings there was testimony from Duke the design  
18 life of the facility was 30 years. If the project  
19 were to operate in excess of 30 years would that  
20 affect your conclusions about project impacts or  
21 about the efficacy of mitigation?

22 MR. HAMBLIN: No.

23 MS. WALKER: No.

24 MS. HOLMES: Earlier this afternoon  
25 there was a discussion by Mr. Marckwald --

1 MR. ELLISON: Just to make sure we've  
2 got a transcript here, is that mike --

3 MS. HOLMES: Is this one recording?

4 MR. ELLISON: -- recording?

5 MS. HOLMES: Okay, thank you. I  
6 apologize.

7 Earlier this afternoon there was  
8 testimony by Mr. Marckwald with regard to the  
9 requirements of Public Resources Code 25529 and a  
10 discussion about whether or not a conveyance was  
11 required. Do you recollect that discussion?

12 MR. HAMBLIN: I do.

13 MS. HOLMES: And do you agree with Mr.  
14 Marckwald's interpretation of staff's testimony  
15 with regard to that point?

16 MR. HAMBLIN: I do.

17 MS. HOLMES: Thank you. What I'd like  
18 to do now is simply walk through the  
19 recommendations of the various parties for the  
20 conditions of certification. Let's start with  
21 Duke's recommendations on land-3.

22 They actually provided two alternative  
23 recommendations having to do with timing. Do you  
24 have a response to those recommendations?

25 MR. HAMBLIN: There was discussion

1 between displacing the word offsite, and that was  
2 between just before site mobilization, prior to  
3 the start of offsite mobilization. So offsite  
4 site mobilization -- I'll get this right.

5 And then staff was comfortable with  
6 their additional language, but staff was just  
7 going for the sake of clarity and saving a few  
8 words, just go ahead and essentially delete the  
9 underline being requested for believing that  
10 saying offsite site mobilization clarified the  
11 question.

12 MS. HOLMES: So you're comfortable with  
13 the suggestion that Mr. Marckwald made from the  
14 stand today?

15 MR. HAMBLIN: Correct.

16 MS. HOLMES: Thank you. In addition,  
17 there were actually two recommendations with  
18 respect to land-4. The first one came from the  
19 applicant, and you can find it in the underline  
20 section at the bottom of condition of  
21 certification.

22 In addition, the City recommended  
23 including the phrase, as determined by the CPM at  
24 the end of that underlined section.

25 Do you have a recommendation with

1       respect to both of those changes?

2               MR. HAMBLIN:  No.  Staff supports them.

3               MS. HOLMES:  Thank you.  And with  
4       respect to land-5, the applicant had suggested  
5       adding the words CPM in terms of submission of  
6       certain plans.  Is that a change that staff  
7       supports?

8               MR. HAMBLIN:  Staff supports the  
9       addition.

10              MS. HOLMES:  Thank you.  I'd like to  
11      turn now to the testimony of the City of Morro  
12      Bay, which I believe is exhibit 173.

13              Earlier today there was a discussion by  
14      the Duke witnesses about whether or not the  
15      project would require a height variance.  Rather  
16      than have you go through this whole discussion  
17      once again, I'd just ask you if you agree with  
18      Duke's testimony on that part?

19              MR. HAMBLIN:  Staff considers this a  
20      replacement, and therefore isn't concerned about  
21      the height requirement issue, as explained in  
22      testimony.

23              MS. HOLMES:  And if the Committee were  
24      to agree with the City of Morro Bay that the  
25      project is not new construction and the height

1       limitation applies, does staff believe that the  
2       agreement to lease terms would be required in  
3       order to reach a finding of greater than normal  
4       public benefit?

5               MR. HAMBLIN:  No.

6               MS. HOLMES:  Thank you.  With respect to  
7       the general question of consistency, do you  
8       believe that the project -- excuse me, strike  
9       that.

10              Cut this even shorter, I hope.  Lastly,  
11       with respect to the City's recommendations in its  
12       testimony for a new condition of certification  
13       does staff support adding a new condition of  
14       certification requiring the agreement to lease  
15       provisions?

16              MR. HAMBLIN:  No.

17              MS. HOLMES:  And are there, in fact, any  
18       specific provisions of the agreement to lease that  
19       at this point give staff cause for concern?

20              MR. HAMBLIN:  Yes.

21              MS. HOLMES:  Can you please explain what  
22       that is?

23              MR. HAMBLIN:  Well, as written, there  
24       was a number of financial issues that are  
25       presented which staff is not familiar with where

1       some of these items are even coming from, or where  
2       their origin is, whether it's with the  
3       requirements under a LORS issue specifically, and  
4       then a follow up through some sort of fee  
5       ordinance where it's being tied to.

6               Whether it's an issue involving a  
7       mitigation under CEQA. Or whether this is a  
8       community benefit package item.

9               MS. HOLMES: Thank you. And does staff  
10      have any specific concerns about the restrictive  
11      covenant that would prohibit the site from former  
12      power plant being used for energy-related  
13      purposes?

14              MR. HAMBLIN: Yes.

15              MS. HOLMES: Can you please explain what  
16      that concern is?

17              MR. HAMBLIN: Alternative options that  
18      may be considered would be limited.

19              MS. HOLMES: Are you referring to  
20      cooling options that are going to be discussed at  
21      a workshop next week, and may be the subject of  
22      testimony?

23              MR. HAMBLIN: That is correct.

24              MS. HOLMES: Thank you. That concludes  
25      staff's testimony, so if there are no objections

1 I'd like to move that portion of exhibit 143 into  
2 the record.

3 HEARING OFFICER FAY: Is there  
4 objection? I hear none, so moved.

5 HEARING OFFICER FAY: Is the panel  
6 available?

7 MS. HOLMES: Yes, they are.

8 HEARING OFFICER FAY: Mr. Ellison.

9 MR. ELLISON: Just one question, since  
10 Ms. Holmes asked most of my cross-examination on  
11 direct.

12 CROSS-EXAMINATION

13 BY MR. ELLISON:

14 Q If you could refer to page 3-22 of your  
15 testimony. In Mr. Marckwald's direct examination  
16 he stated with respect to the 4.5 acres of  
17 sensitive dune scrub habitat that's referenced in  
18 the middle of this page, that his understanding  
19 was that the impact was .33 acres, and not 4.5  
20 acres. Do you recall that testimony?

21 MR. HAMBLIN: I do.

22 MR. ELLISON: Recognizing that this is a  
23 biology issue, I'm not going to ask you to testify  
24 about biology, but I do want to ask you this. If  
25 it were the case that the impacted area were less



1       than 4.5 acres, for example .33 acres, would that  
2       change in any way any of your conclusions in this  
3       testimony?

4               MR. HAMBLIN:  No.

5               MR. ELLISON:  Thank you, that's all I  
6       have.

7               HEARING OFFICER FAY:  City of Morro Bay.

8               MR. ELIE:  Yes.

9                               CROSS-EXAMINATION

10       BY MR. SCHULTZ:

11               Q       I'd like to take you through some of  
12       your testimony.  If you could turn to page 337,  
13       please.

14               As I understand your testimony you're  
15       taking the same position as Duke in that zoning  
16       ordinance regarding the maximum 30-foot height  
17       does not apply because this is considered  
18       replacement or repair of existing structure, is  
19       that correct?

20               MR. HAMBLIN:  That's correct.

21               MR. SCHULTZ:  But then in that second  
22       paragraph on 337 you do go into and list six  
23       different items if in fact a greater than normal  
24       benefit had to be found, is that correct?

25               MR. HAMBLIN:  That's correct.

1           MR. SCHULTZ: And those items are one,  
2           the replacement of the plant's existing 450 feet  
3           height stacks with the 145 feet height stacks; and  
4           two, remodeling of the seawater intake structure's  
5           facade; number three, the constructing of three  
6           additional bypass segments; and four, the building  
7           of the Morro Creek pedestrian/bike bridge.

8           Number five, the realignment and  
9           extension of the Embarcadero; and number six, the  
10          dedication of the Den Dulk property and Coleman  
11          Park to the City for recreation and public coastal  
12          access. And number seven, the dedication of  
13          conservation and public use and access easements  
14          are a key project components that cumulatively  
15          reflect a greater than normal public benefit.

16          Is that why your testimony earlier was  
17          that if, in fact, a greater than normal benefit  
18          had to be found that the agreement to lease would  
19          not have to be incorporated?

20          MR. HAMBLIN: We --

21          MR. SCHULTZ: I believe your testimony  
22          was that even if a greater than normal benefit  
23          would not have to be -- if a greater than normal  
24          benefit had to be found, that the agreement to  
25          lease would still not have to be incorporated.

1 And you didn't explain why it would not be. And  
2 I'm assuming it's because you found that these  
3 seven items do reach the greater than normal  
4 benefit, and therefore you do not have to reach  
5 the agreement to lease.

6 MR. HAMBLIN: These were items that Duke  
7 had put forward. And these are items that Duke  
8 had put forward, yes. The concern in the  
9 agreement to lease was that we're looking at a  
10 series of monetary fiduciary items which staff for  
11 one, has questions on whether they're even land  
12 use in this technical area, or some other  
13 technical area.

14 Two, again there's a legal concern, and  
15 I'm not going to profess to be an attorney, but  
16 under -- there's some question and  
17 uncomfortableness on staff's coming in and  
18 supporting a series of fees without understanding  
19 the actual legal nexus for having them. Other  
20 than an unsigned agreement.

21 MR. SCHULTZ: Okay, thank you. Then,  
22 I'd like you to turn to page 318 of your  
23 testimony.

24 MR. HAMBLIN: One more time, 318?

25 MR. SCHULTZ: 318.

1 MR. HAMBLIN: Okay.

2 MR. SCHULTZ: Public access chapter 3,  
3 article 2, your response to that section halfway  
4 down you state: additionally upon the completion  
5 of the project a new pedestrian/bike bridge  
6 connecting the two currently owned connected  
7 section with the Embarcadero will enhance public  
8 access to the coast, as would the proposed bike  
9 path and dedication of Den Dulk property for  
10 public coast access.

11 Could you point me to a condition of  
12 certification that's being proposed that requires  
13 either a dedication or a conveyance or any type  
14 with regards to the Den Dulk property?

15 MR. HAMBLIN: The dedication of the Den  
16 Dulk property is under land-2. And actually it's  
17 not specific to the Den Dulk property, but the  
18 applicant is required under the Warren Alquist Act  
19 to provide a public use easement.

20 Now, I think what is important to  
21 distinguish is we have a discussion between, as  
22 I've heard and as I've seen in the City's  
23 testimony, between conveyance and dedication.

24 In the course of this project, or in the  
25 course of this discussion on land-2, and in

1       accordance with section 25529, the Warren Alquist  
2       Act specifically identifies that it can be an  
3       easement --

4               MR. SCHULTZ: I don't --

5               MR. HAMBLIN: -- no land conveyance.

6               MR. SCHULTZ: I don't want to get you  
7       caught up with the conveyance or --

8               MR. HAMBLIN: Okay.

9               MR. SCHULTZ: -- the dedication because  
10      the City does not have an issue with that, either.  
11      That can be worked out.

12              What I'm more concerned about is your  
13      testimony is that there's going to be a conveyance  
14      or a dedication of Den Dulk, and I just want to  
15      point out there is no condition of certification  
16      that requires that, is that correct?

17              MR. HAMBLIN: That's correct.

18              MR. SCHULTZ: In regards to the same  
19      page, 318, the last paragraph: Duke Energy is to  
20      construct a 24-foot with permanent bridge. Do you  
21      have any condition of certification that requires  
22      a permanent bridge to be installed?

23              MR. HAMBLIN: Not under land use.

24              MR. SCHULTZ: Do you have any at all  
25      within the entire FSA proposed conditions of

1 certification, that is with the permanent bridge?

2 MR. HAMBLIN: I can only identify the  
3 land use.

4 MR. SCHULTZ: With regards to page 319,  
5 and this is still under the public access, under  
6 the third paragraph, the project proposed is to  
7 construct several addition areas of new class 1  
8 and 2 bicycle and pedestrian paths.

9 Could you point to the condition of  
10 certification that's proposed that will mandate  
11 that Duke construct new class 1 and 2 bicycle and  
12 pedestrian paths?

13 MR. HAMBLIN: Land-6 was the item that  
14 was discussed and negotiated between the Coastal  
15 Commission and the applicant and staff. And  
16 identifies about the class 1 bike paths and class  
17 2.

18 MR. SCHULTZ: Where's that say they're  
19 to construct the class 1 and class 2 -- it's an  
20 endowment for their maintaining that, but what  
21 about the construction of it?

22 MR. HAMBLIN: Okay, all you're asking is  
23 Duke specifically going to do it as opposed to use  
24 of the money to hire somebody? I am seeking  
25 clarification.

1           MR. SCHULTZ: I see no condition of  
2           certification where they're actually required to  
3           do the bike path, as opposed to maintaining about  
4           the bike path.

5           MR. HAMBLIN: What will happen -- it is  
6           presumed that that will occur; there has been  
7           discussions. There's also consideration in this  
8           condition that the intent that that will go  
9           forward.

10          Also I would add that some of these  
11          moneys are to be held by the Commission for use  
12          for this purpose of the bike path.

13          MR. SCHULTZ: Would you have a problem  
14          with amending that to make sure it's also that  
15          they have the responsibility to construct that  
16          bike path, also? Those bike paths.

17          MR. HAMBLIN: I could consider that with  
18          discussions with the applicant.

19          MR. SCHULTZ: Again, on page 321, the  
20          first paragraph towards the bottom, last sentence  
21          says: In addition components of the project  
22          include new recreation facilities (bike paths, the  
23          Embarcadero extension, bike and foot bridge and  
24          the dedication of the Den Dulk property and  
25          Coleman Park to the City of Morro Bay.

1           Could you provide me with the condition  
2           of certification that's proposed, either has a  
3           dedication or conveyance of either the Den Dulk  
4           property or Coleman Park to the City of Morro Bay?

5           MR. HAMBLIN: Not specifically to the  
6           City. I would refer again to land-2, since our  
7           requirement is that the land be provided, public  
8           use land be dedicated under an easement.

9           Now, whether or not that goes to the  
10          City or to a state agency, as stated in the  
11          condition, remains to be determined.

12          And I would also add that the applicant  
13          does have the opportunity, if they so choose, to  
14          fee title the land to the City.

15          MR. SCHULTZ: And I would turn you back  
16          to your testimony on 3.37 regarding the greater  
17          than normal benefits, that they were required to  
18          be found. In number 6 is the dedication of the  
19          Den Dulk property and Coleman Park to the City for  
20          recreation and public coastal access.

21          Is that anywhere a condition of  
22          certification as proposed?

23          MR. HAMBLIN: As specifically spelled  
24          out in 6, no.

25          MR. SCHULTZ: Is there any condition of



1 certification as to number 7 that there's a  
2 dedication of conservation or public use in access  
3 easements?

4 MR. HAMBLIN: That ranges through  
5 several areas.

6 MR. SCHULTZ: Where?

7 MR. HAMBLIN: We have conservation  
8 easements are being discussed in biology, public  
9 uses under us in the land use section; access to  
10 coastal, that was in the follow up to some Coastal  
11 Act activities. As well as the general statement  
12 being made.

13 MR. SCHULTZ: On page 326 under the  
14 general -- policies, objective number one. You  
15 state that the proposed project would provide the  
16 City with a suite of public improvements including  
17 but not limited to land dedications, again not  
18 worry about the word dedications or conveyances or  
19 what condition of approval is there that requires  
20 any type of land dedication or advances from the  
21 applicant to the City of Morro Bay?

22 MR. HAMBLIN: Again, we would refer to  
23 land-2.

24 MR. SCHULTZ: Under land-2 there are no  
25 requirements that are required to be made to the

1 City of Morro Bay, though, is that true?

2 MR. HAMBLIN: That is true, other than  
3 the City would be one opportunity. If the City  
4 elected not to choose, the state becomes also an  
5 opportunity.

6 MR. SCHULTZ: Page 3-38, under the Den  
7 Dulk property, as part of the proposed project the  
8 applicant has purchased the Den Dulk property and  
9 is committed to dedicating it and Coleman Park to  
10 the City. What do you base that testimony on?

11 MR. HAMBLIN: Two lines later, the  
12 purpose of the purchase is to further improve  
13 coastal access, avoid potential developments of  
14 sensitive habitat, and provide a buffer area, as  
15 explained in the --

16 MR. SCHULTZ: So where you say, and has  
17 committed to dedicating it and the Coleman Park to  
18 the City, what do you base that testimony on that  
19 they're committed to doing that?

20 MR. HAMBLIN: The purpose of what they  
21 were quoted in, the two lines later. That was the  
22 purpose statement in which they've indicated why  
23 they were pursuing Coleman Park and why it will go  
24 to the City.

25 MR. SCHULTZ: But there is no formal

1 commitment in the conditions of approval that will  
2 require that to occur, or the conditions of  
3 certification?

4 MR. HAMBLIN: No. Other than, again,  
5 land-2.

6 MR. SCHULTZ: With regards to land-1,  
7 which is the requirement that Duke require to  
8 obtain the final executed outfall lease agreement,  
9 I point you to your testimony in regards to that  
10 condition on page 3-25, the bottom. And I'll  
11 quote the last paragraph of that: Assuming that  
12 Duke and the City are successful in negotiating  
13 the outfall agreement, the proposed project would  
14 be in compliance with state requirements for  
15 leasing of tidelands and submerged lands.

16 Based on that testimony is where you  
17 came with the requirement for land-1, is that  
18 correct?

19 MR. HAMBLIN: Well, actually that's  
20 required under the Public Trust and Navigation  
21 Act, is what I was coming from, Public Resources  
22 Code 6107, 6706.

23 MR. SCHULTZ: Okay. And with regards to  
24 land-1, you're requiring that that final executed  
25 outfall lease agreement be submitted prior to

1 November 15, 2004, or prior to the start of  
2 commercial operations, is that correct?

3 MR. HAMBLIN: Correct.

4 MR. SCHULTZ: Assuming that Duke obtain  
5 certification sometime this year and began  
6 construction in 2003, and is not finished with  
7 construction by November 15, 2004, and also did  
8 not have a lease agreement, what would be the  
9 ramifications under that circumstances?

10 MR. HAMBLIN: November 16th they would  
11 be in default of the agreement to lease, and  
12 potentially some type of enforcement action by the  
13 Commission.

14 MR. SCHULTZ: Wouldn't a better  
15 condition be then for Duke to obtain that outfall  
16 lease prior to the beginning of construction so  
17 that there wouldn't be any shutdown of the  
18 construction project, or any enforcement action by  
19 the CEC?

20 MR. HAMBLIN: The expiration of the  
21 contract is on November 15, 2004. It is our  
22 expectation that the negotiations between the City  
23 and the applicant will be concluded by then.

24 MR. SCHULTZ: That didn't quite answer  
25 my question. My question is, is wouldn't it be a

1 better practice and more prudent for Duke to  
2 obtain that outfall lease agreement prior to  
3 beginning construction?

4 MR. HAMBLIN: It would be the earlier  
5 the better. I mean this is the sunset date, the  
6 final date on which you need to be having it. You  
7 cannot go past go at this point. So, yes, anytime  
8 we could receive that agreement, or that could be  
9 worked out between the City and the applicant,  
10 yes, that would be better.

11 MR. SCHULTZ: Nothing further.

12 HEARING OFFICER FAY: CAPE.

13 MS. CHURNEY: Yes.

14 CROSS-EXAMINATION

15 BY MS. CHURNEY:

16 Q Mr. Hamblin, on page 3-26 of your  
17 testimony, you state that the proposed project  
18 would improve the overall quality of life for the  
19 community of Morro Bay. Do you see that? It's  
20 under objective 1.

21 MR. HAMBLIN: Yes.

22 MS. CHURNEY: In reaching this  
23 conclusion did you take into account the increases  
24 in PM10 and SO2 which will result from the new  
25 plant?

1                   MR. HAMBLIN: I refer that to our air  
2                   quality folks.

3                   MS. CHURNEY: And did they get back to  
4                   you with an answer?

5                   MR. HAMBLIN: They testified today.

6                   MS. CHURNEY: Okay, so they didn't get  
7                   back to you in any way with a response that you  
8                   then incorporated into your conclusion?

9                   MR. HAMBLIN: I support their testimony.

10                  MS. CHURNEY: You agree that good health  
11                  and good air quality have an impact on quality of  
12                  life?

13                  MR. HAMBLIN: Good health and good --  
14                  what was that?

15                  MS. CHURNEY: Good health and good air  
16                  quality.

17                  MR. HAMBLIN: That, among others.  
18                  Exercise is another one.

19                  MS. CHURNEY: So, if the plant adversely  
20                  impacts both good health and good air quality  
21                  there would be a decrease in quality of life, do  
22                  you agree with that?

23                  MR. HAMBLIN: I think that's a good  
24                  assumption.

25                  MS. CHURNEY: And I didn't see any

1 discussion in your testimony concerning the Morro  
2 Bay land use policy 5.22 --

3 MR. HAMBLIN: That's an issue under air  
4 quality. Keep in mind, I think it's something we  
5 need to clarify, also, that it's not just -- land  
6 use is my area. But there are also biotic  
7 conditions; there are also air quality issues;  
8 there's also traffic issues that come up in the  
9 demand use plan.

10 And the other technical areas, of which  
11 there are 22 of them, also are reviewing this  
12 document for that type of review.

13 MS. CHURNEY: So in response to my  
14 question you did not take into account  
15 consideration of that land use policy?

16 MR. HAMBLIN: Again, I would have to  
17 support the testimony on air quality presented by  
18 technical staff earlier.

19 MS. CHURNEY: Well, they didn't testify  
20 specifically with respect to the land use policy  
21 5.22. So just to answer my question you did not  
22 take into account in your analysis that particular  
23 land use policy?

24 MR. HAMBLIN: I read the policy and  
25 determined that it was air quality oriented, did

1 not respond.

2 MS. CHURNEY: And in your discussion  
3 regarding expansion on page 3-32 you state that  
4 expansion is best understood by reviewing the  
5 long-range expansion plans.

6 Okay, but the long-term expansion  
7 planned for the PG&E plant wouldn't necessarily be  
8 evidence of the only way a plant might expand, is  
9 that correct?

10 MR. HAMBLIN: Correct.

11 MS. CHURNEY: And there's nothing in the  
12 City's land use plan that dictates that is the  
13 only way a plant might expand, or that that is the  
14 correct definition of the word to expand?

15 MR. HAMBLIN: There are numerous terms  
16 for expansion. I think the example that was used  
17 in the testimony by the City's actual group,  
18 Sheppard, Mullin, Richter and Hampton, talked  
19 about their being four generators, and then going  
20 to seven generators. That could be deemed an  
21 expansion.

22 Expansion shouldn't be left solely to  
23 the contrites of acreage. There may be other  
24 issues that are involved. And the argument or the  
25 discussion put forth in this staff section



1 supports that.

2 MS. CHURNEY: In fact, didn't Sheppard  
3 Mullin also suggest the use of the plain meaning  
4 of the term expand is not only appropriate, but  
5 the courts are guided by the plain meaning of  
6 words?

7 MR. HAMBLIN: And you could look up a  
8 definition, yes.

9 MS. CHURNEY: And under the plain  
10 meaning of the word expand, as set forth in that  
11 Sheppard Mullin memo that you just referenced, and  
12 as defined by Webster, this project, with an  
13 increase in size of a footprint from 9.61 acres to  
14 14 acres could be considered an expansion,  
15 correct?

16 MR. HAMBLIN: If you look at acreage,  
17 yes.

18 MS. CHURNEY: And referring to page 3-33  
19 of your testimony you state expansion at the time  
20 the land use plan was adopted referred to an in-  
21 kind addition. Do you see that?

22 MR. HAMBLIN: No.

23 MS. HOLMES: Sorry, which page are you  
24 on?

25 MS. CHURNEY: 3-33.

1 MR. HAMBLIN: Can you identify the  
2 paragraph?

3 MS. CHURNEY: Yes, it's the second  
4 paragraph there. First complete paragraph.

5 MR. HAMBLIN: Okay, this is the Sheppard  
6 Mullin Richter, okay.

7 MS. CHURNEY: There's nothing in the  
8 land use plan that supports that conclusion, is  
9 there?

10 MR. HAMBLIN: I'm not sure what you're  
11 saying.

12 MS. CHURNEY: The fact that expansion at  
13 the time the land use plan was adopted referred to  
14 an in-kind addition.

15 MS. HOLMES: I'm going to have to -- I'm  
16 not sure it's quite an objection, but perhaps it  
17 would be appropriate to ask some questions about  
18 the extent to which Mr. Hamblin relied upon this  
19 letter.

20 This is a letter that was written by an  
21 attorney for the City, and it seems to me that  
22 counsel is asking him to testify as to what the  
23 intent of the City was in drafting the letter.

24 MS. CHURNEY: No, --

25 MS. HOLMES: I don't mind questions

1 about to the extent to which he relied upon a  
2 letter, but I do have a concern about questions  
3 asking him to discuss what was in the City's mind  
4 when they wrote the letter, or what the City's  
5 intent was in drafting the letter.

6 MS. CHURNEY: No, I'm not asking him  
7 that. It appears to me, based on the fact that  
8 he's quoted verbatim large sections of this memo,  
9 that he's adopting it as his own testimony. If  
10 I'm incorrect in that assumption, please let me  
11 know. And if that's the case, then I think I am  
12 entitled to explore with him what the basis of  
13 that --

14 MR. HAMBLIN: Let me add that this  
15 question has come up. The City and CEC and even  
16 the applicant had discussions on this. This was  
17 started back at the PSA hearing. And this  
18 concluding information from the City was what  
19 staff ended up coming forward with and presented  
20 in the FSA.

21 MS. CHURNEY: Okay, I don't think that  
22 answers my question. Just going back to the  
23 question, there's nothing that you know of in the  
24 land use plan that supports --

25 MR. HAMBLIN: Okay, you're talking the

1 Coastal Land Use plan, okay?

2 MS. CHURNEY: Yes.

3 MR. HAMBLIN: Okay. That supports  
4 expansion?

5 MS. CHURNEY: Supports this definition  
6 of expansion --

7 MR. HAMBLIN: That was provided by  
8 Sheppard Mullin and Richter? That, I don't know.  
9 I'd have to refer to Sheppard Mullin and Richter.

10 MS. CHURNEY: And if you could refer to  
11 page, the same page, down towards the bottom of  
12 the page.

13 MR. HAMBLIN: Okay, this is the last  
14 paragraph?

15 MS. CHURNEY: Let me get the exact  
16 location. I'm sorry, first go back to the  
17 paragraph we were in.

18 MR. HAMBLIN: Okay.

19 MS. CHURNEY: And the next, the third  
20 sentence: Expansion did not mean a reduction in  
21 square footage, height or mass, nor did it refer  
22 to reduction in the onsite area used for energy  
23 development. Do you see that?

24 MR. HAMBLIN: Correct.

25 MS. CHURNEY: And I guess I should be

1 asking this preliminary question. Are you  
2 adopting that as your testimony here?

3 MR. HAMBLIN: That we're not increasing  
4 the number of units, yes. That the expansion that  
5 Sheppard Mullin Richter and Hampton has described  
6 I can support.

7 MS. CHURNEY: But that is not what is  
8 actually going to happen here, would you agree  
9 with that? For example, there will be an increase  
10 in the footprint.

11 MR. HAMBLIN: That was explained  
12 earlier, yes, 9 to 14 acres.

13 MS. CHURNEY: Okay. And finally, down  
14 at the bottom of page 3-33, it's the fourth  
15 paragraph in the last -- the fourth sentence in  
16 the last paragraph, you state that interpreting  
17 the term expansion to include an increase in  
18 generating capacity without a corollary increase  
19 in physical proportions of the facility and an  
20 increase in physical impacts is inconsistent with  
21 the manner in which the term is used through the  
22 CLUP, do you see that?

23 MR. HAMBLIN: Correct.

24 MS. CHURNEY: This suggests, does it  
25 not, that an increase in generating capacity

1 coupled with an increase in physical proportions  
2 and impacts could be interpreted to be an  
3 expansion as that term is used in the CLUP in  
4 general plan, is that correct?

5 MR. HAMBLIN: I think that could be one  
6 way. Also if we look at what's being demolished,  
7 that's another part of the equation.

8 MS. CHURNEY: Okay, thank you. I have  
9 no further questions.

10 HEARING OFFICER FAY: Okay. Any  
11 redirect, Ms. Holmes?

12 MS. HOLMES: A couple of questions.

13 REDIRECT EXAMINATION

14 BY MS. HOLMES:

15 Q First of all, just on that last point.  
16 When you looked at whether or not the project was  
17 an expansion, first of all did you look at things  
18 other than simply the size of the footprint?

19 MR. HAMBLIN: Yes.

20 MS. HOLMES: And would you consider the  
21 demolition of the tanks an appropriate thing to  
22 consider in making that evaluation?

23 MR. HAMBLIN: Yes.

24 MS. HOLMES: With respect to several  
25 questions that were asked of you by the City with

1       respect to the bridge and the bike path, were  
2       those elements of the project described in the  
3       AFC?

4               MR. HAMBLIN:   Yes.

5               MS. HOLMES:   And did staff simply assume  
6       that those project elements were part of the  
7       project and didn't need a condition of  
8       certification --

9               MR. HAMBLIN:   Yes.

10              MS. HOLMES:   -- as a result?   Thank you.  
11       Lastly, if the Den Dulk and the Coleman Park  
12       property were not dedicated to the City, but were  
13       provided -- but there was other land provided  
14       pursuant to land-2, in your opinion would there  
15       still be a public benefit?

16              MR. HAMBLIN:   Yes.

17              MS. HOLMES:   Thank you.   No further  
18       questions.

19              HEARING OFFICER FAY:   Any follow up  
20       within the scope?   Yes.

21                           RE CROSS-EXAMINATION

22       BY MR. SCHULTZ:

23              Q       As a follow up to your question, if, in  
24       fact, there is an element of a project in the AFC,  
25       in this case the dedication of land, but it

1 doesn't make it into any conditions of  
2 certification, would the applicant be required to  
3 dedicate that land to whoever the person was  
4 listed in the AFC?

5 MS. HOLMES: I think that's a question  
6 that calls for something of a legal conclusion.  
7 It is something that has come up, I know, in  
8 compliance matters on other cases, the extent to  
9 which project elements that are described in the  
10 AFC are required or become part of the  
11 Commission's decision.

12 I don't know if that's something that  
13 the Committee wants parties to address in briefs.  
14 I mean it gets fairly complicated, as I'm sure  
15 Chairman Keese is aware as a result of some --

16 HEARING OFFICER FAY: Yeah, I think that  
17 would be good to address in the briefs. And I  
18 also have a question of Mr. Chia, who -- are you  
19 still there, Mr. Chia?

20 MR. CHIA: I'm still here.

21 HEARING OFFICER FAY: You're still here.  
22 How patient. But first, before we get to that, --

23 MR. SCHULTZ: It's an objection to my  
24 question, so I was just wondering if you're  
25 sustaining that objection or you're going to allow



1 him to answer.

2 HEARING OFFICER FAY: Well, yes, that's  
3 sustained. But I think Ms. Holmes' recommendation  
4 is well taken, that the parties address this in  
5 their briefs as to what --

6 MR. SCHULTZ: I'm sure you understand in  
7 our issue there is quite a few items that have  
8 been listed in the project description or the AFC  
9 that is not making it into the conditions of  
10 certification.

11 HEARING OFFICER FAY: All right. Any  
12 other follow up, then, within the scope of staff's  
13 redirect?

14 I see no indication, okay. I have first  
15 a question for Mr. -- well, for the panel.

16 EXAMINATION

17 BY HEARING OFFICER FAY:

18 Q Are either of you familiar with any of  
19 the options proposed for the aquatic filter  
20 barrier, sometimes called the gunderboom, that  
21 involves dock facilities adjacent to the harbor?

22 MR. HAMBLIN: Yes.

23 HEARING OFFICER FAY: Yes.

24 MR. HAMBLIN: I say that very lowly  
25 here.

1 HEARING OFFICER FAY: All right.

2 (Laughter.)

3 HEARING OFFICER FAY: Well, in the  
4 general sense, would one of the options that  
5 includes additional dock space be consistent with  
6 at least policy LU-19 that talks about  
7 refurbishing the area around the seawater intake  
8 structure consistent with a fishing village image,  
9 et cetera?

10 MR. HAMBLIN: I'm not sure what the  
11 question is.

12 HEARING OFFICER FAY: Would adding dock  
13 space --

14 MR. HAMBLIN: Serve as a public benefit?

15 HEARING OFFICER FAY: Yes, in the  
16 concept, in the City's goal towards enhancing the  
17 fishing village image.

18 MR. HAMBLIN: Yes.

19 HEARING OFFICER FAY: Okay, and if under  
20 the dock space was hanging an aquatic barrier that  
21 would still be consistent?

22 MR. HAMBLIN: It could serve a dual  
23 purpose.

24 HEARING OFFICER FAY: Okay. Thank you.

25 And then I'd like to get back to Mr. Chia, if

1       you're still there?

2                   MR. CHIA:  Yes.

3                   HEARING OFFICER FAY:  Question.  Has the  
4       Coastal Commission reviewed this question of the  
5       dedication of these various coastal access  
6       properties that have been discussed today, and do  
7       you have a comment or opinion to make on how that  
8       should be phrased in the conditions of  
9       certification?

10                  MR. CHIA:  We have met at staff level,  
11       discussed the condition of certification, I guess  
12       it would be 2 in this case.

13                  We are concerned that -- I'm sorry, that  
14       reverberation is kind of distracting -- we are  
15       concerned that the discussion of the FSA describes  
16       that the onsite improvements could serve as a  
17       public use, which could be used to address the  
18       applicant's public use requirement.

19                  However, on page 3-45 of the FSA staff  
20       goes on by saying that, quote, "the public use  
21       land requirement under the Warren Alquist Act  
22       potentially permits land dedication outside of the  
23       designated coastal zone for this project."

24                  And that would appear inconsistent with  
25       the intent of section 25529 whereby a facility

1 located in the coastal zone should be required to  
2 acquire and dedicate land in the general vicinity  
3 of the project.

4 So we would recommend that the condition  
5 be worded so as to require dedication or  
6 acquisition of land within the coastal zone,  
7 preferably within the City of Morro Bay.

8 And I realize that is likely the intent  
9 of Duke in trying to satisfy that section. But we  
10 feel that it should be explicit in this case of a  
11 very important project.

12 Also, another, what I just quoted  
13 earlier on page 3-38 of the FSA, states that a  
14 portion of the property contained in area known as  
15 Coleman Park which potentially with onsite  
16 improvement. And my question is will Duke be  
17 required to actually improve Coleman Park. Is  
18 that, in itself, a separate requirement in order  
19 to satisfy section 25529?

20 HEARING OFFICER FAY: And is that a  
21 question, or do you have an opinion to give us on  
22 that?

23 MR. CHIA: All the land dedications that  
24 have been referenced in the lease with the City,  
25 as well as any dedications that have been proposed

1 in the AFC, and referenced in the FSA, the Coleman  
2 Park dedication, the Den Dulk dedication, we would  
3 consider those as a whole in assessing the  
4 project's consistency with the Coastal Act with  
5 respect to public access and recreation policies,  
6 as well as the other conditions of certification.

7 And as a whole, yes, at a staff level we  
8 would recommend to the Commission that those  
9 dedications or acquisitions will satisfy the  
10 coastal access and recreation policies of the  
11 Coastal Act.

12 HEARING OFFICER FAY: So, at least at  
13 the staff level, specifically the Coleman Park and  
14 the Den Dulk property do satisfy those coastal  
15 access goals, is that correct?

16 MR. CHIA: I don't know if I can single  
17 out just those two properties. I would probably  
18 have to further confer with staff once a formal  
19 proposal to satisfy section 25529 has been made.

20 In previous statements we've made we've  
21 identified other properties that are proposed to  
22 be dedicated to the City, I believe along the  
23 wharf. I can't recall exactly what other  
24 properties, but we've identified them as a whole,  
25 collectively.

1 HEARING OFFICER FAY: All right. Thank  
2 you. Are there any other comments that you'd like  
3 to give us at this time?

4 MR. CHIA: Yes, I have a few other  
5 comments. With respect to dune impacts due to  
6 construction of the access road we feel at this  
7 time that it's a little bit premature to make any  
8 findings of consistency, particularly section  
9 30240A of the Coastal Act, which states that  
10 surrounding the sensitive areas shall be protected  
11 against any significant disruptions of habitat  
12 values, and only uses dependent on those resources  
13 shall be allowed within those areas.

14 Number one, we still need to make a  
15 finding, or at least would like a finding that  
16 that access road is actually dependent on those  
17 resources to the extent it impacts environmentally  
18 sensitive habitat areas.

19 Secondly, we understand that Duke is  
20 currently in discussions with the U.S. Fish and  
21 Wildlife Service regarding the bridge over Morro  
22 Creek, and whether that bridge should remain  
23 temporary or permanent.

24 We understand that in Duke's most recent  
25 biological assessment filing it states that Duke

1 is unable to accommodate, I guess, the request of  
2 the Fish and Wildlife Service.

3 We're concerned that until that issue is  
4 resolved, or if that bridge is temporary, for  
5 example, to what extent can those dune impacts be  
6 minimized or eliminated all together with a  
7 reconfiguration of that road to accommodate its  
8 temporary nature.

9 And secondly, for the record, in that  
10 biological assessment finding Duke identifies or  
11 states that it is because the Coastal Commission  
12 considers the pedestrian bicycle use of the Morro  
13 Creek bridge an important part of the project's  
14 coastal access requirements that Duke is unable to  
15 consider the bridge as a temporary one.

16 And we have not formally or informally  
17 weighed in on the permanence of impermanence of  
18 that bridge, and I would question Duke's citation  
19 of us in that assessment.

20 Another comment. In response to one of  
21 our comments in the PSA we requested that, I  
22 believe in land-2 or with respect to any  
23 dedication to satisfy that section 25529 that it  
24 be worded to protect any sensitive species or  
25 habitats.

1           CEC responded that they don't have the  
2           authority to restrict public access in order to  
3           meet the intent and language of that section. We  
4           feel that restricting public use to protect  
5           sensitive resources and to allow for public access  
6           are not incompatible activities.

7           This section does allow the CEC to  
8           restrict public use for security and public safety  
9           reasons. And we feel that protection of sensitive  
10          habitats and species is also an appropriate  
11          factor.

12          And then finally on land-4, the protocol  
13          in order to implement that condition is a bit  
14          confusing, or at least we don't find the  
15          connection between it and the actual condition  
16          requirement.

17          We feel that the applicant should first,  
18          prior to closing any accessways greater than 24  
19          hours, the applicant should first consult with the  
20          CPM, the City and the Executive Director of the  
21          Coastal Commission to determine whether, number  
22          one, the closure is even necessary.

23          If so, we request that the applicant  
24          post notices describing the potential length of  
25          the closure, the nearest alternative accessways,



1 contact information, et cetera.

2 And those are my comments. Thank you  
3 very much.

4 HEARING OFFICER FAY: Okay, and thank  
5 you, Mr. Chia. Any questions of Mr. Chia from any  
6 of the parties?

7 MS. CHURNEY: I don't have any questions  
8 of Mr. Chia, but I do have one follow up question  
9 after your line of questioning regarding the  
10 gunderboom, if I might.

11 HEARING OFFICER FAY: Well, before we  
12 get into that, I just want to note that we have 14  
13 minutes left, and I don't want to make the City  
14 feel like they need to be jammed tonight. Does it  
15 work for you to return tomorrow?

16 MR. ELIE: We prefer that.

17 HEARING OFFICER FAY: Okay.

18 MR. ELIE: We prefer to start with Mr.  
19 Schultz at 9:00.

20 HEARING OFFICER FAY: Ms. Churney, if  
21 you can keep your question brief --

22 MS. CHURNEY: Yes, very quickly.

23 HEARING OFFICER FAY: -- Mr. Schwartz  
24 go.

25 //

## 1 RECROSS-EXAMINATION

2 BY MS. CHURNEY:

3 Q Mr. Hamblin, Mr. Fay asked you a series  
4 of questions regarding the use of the gunderboom  
5 and how that might provide an opportunity to meet  
6 the public use requirement, I believe; and you  
7 responded.

8 Would the use of dry cooling, and  
9 therefore the freeing up of the area on the wharf  
10 currently occupied by the intake structure also  
11 provide an opportunity for meeting that public use  
12 requirement?

13 MS. HOLMES: I'm going to object. That  
14 question is not about a gunderboom.

15 MS. CHURNEY: Well, it is. It's --

16 HEARING OFFICER FAY: Sustained.

17 MS. CHURNEY: Also it's -- well, no, but  
18 it's --

19 HEARING OFFICER FAY: Sustained.

20 MS. CHURNEY: -- also dealing with --

21 HEARING OFFICER FAY: My question, the  
22 gunderboom was really incidental. It was about  
23 the dock aspect of the gunderboom proposal, and  
24 not filter, per se. So I'm going to sustain that  
25 objection.

1 MS. CHURNEY: Well, that's what this  
2 question is about, the dock, the space occupied on  
3 the dock by the intake structure.

4 HEARING OFFICER FAY: All right,  
5 rephrase it. What --

6 MS. CHURNEY: If the option were  
7 selected, rather than gunderboom, a dry cooling  
8 option were selected, and therefore there was no  
9 longer a need for the intake structure on the  
10 wharf, would a dedication by Duke of that space  
11 also meet the same requirements of public use?

12 MR. HAMBLIN: I'd have to think about  
13 it. I can't respond at this time.

14 MS. CHURNEY: What further information  
15 would you need to respond?

16 MR. HAMBLIN: I don't know exactly what  
17 you're -- if you could write it out and just  
18 submit it to me, I think I would prefer to have it  
19 in writing. I'm not clear as to essentially, we  
20 weren't going to talk about cooling till next  
21 week. This may be a question which I can add to  
22 that list of other questions that are coming up.

23 And I also want to maintain consistency  
24 in that other folks have attempted to provide or  
25 to direct cooling questions to me, and I've said

1 no. We're going to do it next week.

2 MS. CHURNEY: I --

3 MR. HAMBLIN: Mr. Hearing Officer, I  
4 would prefer to do it that way. But I will  
5 respond if --

6 HEARING OFFICER FAY: Well, see, it's a  
7 pretty open hypothetical, I suppose --

8 MR. HAMBLIN: If that's --

9 HEARING OFFICER FAY: If that space was  
10 dedicated for something other than water intake,  
11 with that assumption can you respond?

12 MR. HAMBLIN: Sounds like the dock  
13 probably could go there, another fishing outlet, I  
14 don't know. Are we talking tearing the building  
15 down?

16 MS. CHURNEY: Yes, removal of the  
17 building.

18 MR. HAMBLIN: Okay. How deep is the  
19 water there? Is there, is there able to get a  
20 deep fish or charter boat in operation there?

21 MS. CHURNEY: Boats are able to pull up  
22 there.

23 MR. HAMBLIN: Okay, but are they charter  
24 boats or something --

25 MS. CHURNEY: Yes.

1 MR. HAMBLIN: I'm trying to get a grasp  
2 of this area.

3 MS. CHURNEY: It's right next to a  
4 charter boat area.

5 MR. HAMBLIN: Okay, it isn't the City's  
6 hoping to put a dock, some sort of boardwalk along  
7 there? So how would this affect that? Wouldn't  
8 the City want that? And --

9 HEARING OFFICER FAY: Okay, I'm sorry,  
10 Ms. Churney, --

11 (Parties speaking simultaneously.)

12 HEARING OFFICER FAY: This is a colloquy  
13 that I'm not going to entertain. It's a pretty  
14 wide open hypothetical. I think you got an answer  
15 that at least goes to the --

16 MR. HAMBLIN: Potentially there could be  
17 something there other than what is there.

18 MS. CHURNEY: Thank you. And I take it,  
19 too, Hearing Officer Fay, that this can be  
20 revisited during that phase of these proceedings.

21 HEARING OFFICER FAY: Yeah, cooling  
22 alternatives -- yes.

23 MS. CHURNEY: Thank you.

24 HEARING OFFICER FAY: -- will be  
25 addressed at that time.

1 MS. CHURNEY: Thank you.

2 HEARING OFFICER FAY: All right, any  
3 last minute items before we adjourn for this  
4 evening?

5 Mr. Ellison.

6 MR. ELLISON: Yes, Mr. Fay, I do have  
7 one follow up question for staff. And it goes to  
8 the question that was discussed with Mr. Chia that  
9 the temporary versus permanent bridge.

10 And prior to asking the question I do  
11 want to make a clarifying statement since this has  
12 been discussed already on the record, I didn't  
13 think this would come up until biology. But I  
14 think it's important, since it has come up on the  
15 record, to clarify Duke's position on this issue.  
16 And then I did want to ask one question of staff  
17 regarding that.

18 The clarification is this. It is the  
19 case, as Mr. Chia represented, that Duke has  
20 submitted a biological assessment to the U.S. Fish  
21 and Wildlife Service which leaves open the  
22 possibility of a temporary bridge rather than a  
23 permanent bridge.

24 I want to first make clear that it is  
25 Duke's desire and intention, and it remains

1 central to this project description, to build a  
2 permanent bridge. That is in our agreement to  
3 lease, notwithstanding that it's a draft, it is in  
4 the agreement to lease with the City. And we are  
5 exercising our best efforts to make that happen.

6 However, the mitigation that we are  
7 being asked to provide for the bridge involves the  
8 use of properties that are not Duke properties.  
9 They are properties that are in the control of  
10 either the City of Morro Bay or the City of  
11 Cayucas and perhaps others.

12 And for that reason Duke is not in  
13 control necessarily of -- Duke cannot, without  
14 other parties also agreeing, agree to the  
15 mitigation that may be required in order to build  
16 the permanent bridge.

17 And so what we have said is that we will  
18 exercise our best efforts to get those other  
19 parties to satisfy the biology agencies for  
20 whatever mitigation requirements they have. That  
21 remains our intention. We are confident that we  
22 can achieve that.

23 But in the unlikely event that that is  
24 not achievable for reasons beyond Duke's control,  
25 we have put in the biological assessment the

1 fallback of a temporary bridge which would also  
2 satisfy the biology agencies.

3 RE CROSS-EXAMINATION

4 BY MR. ELLISON:

5 Q With that clarification, then, let me  
6 ask you, Mr. Hamblin, if there were to be, as a  
7 result of biology requirements or any other  
8 reason, a temporary bridge rather than a permanent  
9 bridge, would that change any of your conclusions  
10 regarding compliance of the project with all  
11 applicable LORS or the significance of impacts?

12 MR. HAMBLIN: I'm thinking this out,  
13 now. No. It would enhance the package,  
14 obviously, if it was public use land, something of  
15 public service. But, no.

16 MR. ELLISON: Okay.

17 HEARING OFFICER FAY: Any other last  
18 minute questions, then, before we adjourn?

19 MR. SCHULTZ: I would object on that  
20 last question because it was beyond the scope of  
21 redirect, and was also prefaced by testimony by  
22 Mr. Ellison.

23 I'd like the ability to reexamine staff  
24 on that one issue, because I could go through now  
25 with the entire FSA and point out probably at



1 least 30 different terms that he mentions in his  
2 FSA the importance of, the bicycle paths and  
3 bridge.

4 And so now, with five minutes to go  
5 through that, so we're kind of by surprise brought  
6 up this issue of whether it's now a temporary  
7 bridge. And I would like the ability to cross-  
8 examine on that and go through the entire FSA.

9 HEARING OFFICER FAY: Okay, let's go off  
10 the record.

11 (Off the record.)

12 HEARING OFFICER FAY: Would you repeat  
13 what you just said in terms of if a temporary  
14 bridge was proposed by Duke?

15 MS. HOLMES: Right. Notwithstanding Mr.  
16 Hamblin's testimony about the hypothetical  
17 situation, I would point out that in the event  
18 that that hypothetical situation were to become  
19 real, that is if Duke were to propose a temporary  
20 bridge rather than a permanent bridge, staff would  
21 certainly recommend that the Commission require an  
22 amendment be filed, as we do in any other project  
23 when major changes are made.

24 That amendment, in turn, would be  
25 analyzed by staff for compliance with LORS and

1 potential significant impacts. And if it were  
2 necessary, testimony would be provided.

3 It's the same process we would go  
4 through for any other project amendment.

5 MR. ELLISON: Let me clarify something  
6 which I thought I had clarified earlier, but  
7 apparently did not convey clearly enough.

8 Duke is not proposing a temporary  
9 bridge. Duke is not changing its project  
10 description. The prospect of a temporary bridge  
11 is potentially being imposed on Duke as a  
12 condition to satisfy the biology agencies.

13 As an alternative way of satisfying the  
14 biology agencies. We are being told you either do  
15 something which Duke, by itself, cannot agree to,  
16 that requires the agreement of other parties. Or  
17 a temporary bridge by the biology agencies.

18 It is common in this process for  
19 projects to be changed by the Commission Staff or  
20 by other agencies without an amendment by the  
21 applicant being filed. And I can give you a lot  
22 of examples in this proceeding, even on this topic  
23 area, of where the project is being changed by  
24 conditions of certification.

25 That is the point of this process. The

1       only reason for my question to Mr. Hamblin was to  
2       say that if that occurs in biology, which we've  
3       not heard yet, if a new condition is introduced by  
4       someone other than Duke, we're not going to  
5       propose a temporary bridge, but if it is imposed  
6       upon us as a condition of certification, I wanted  
7       Mr. Hamblin's opinion as to whether that created a  
8       land use problem.

9               And his opinion was that his conclusions  
10       would not change. That's the only reason for my  
11       question.

12              MR. SCHULTZ: For the record for the  
13       City, we disagree entirely in the characterization  
14       of it being imposed by the Fish and Wildlife.  
15       That's not the case from the City's standpoint.  
16       And there is way to mitigate this project and  
17       allow for a permanent bridge.

18              HEARING OFFICER FAY: Thank you, Mr.  
19       Schultz. We have your comment. We can, if we  
20       must, revisit this when we get into terrestrial  
21       biology, which is really the linchpin regarding  
22       the bridge. And it's much more of a question in  
23       that area than a land use question.

24              Any final comments before we adjourn  
25       tonight?

1 MS. HOLMES: Is Mr. Hamblin dismissed or  
2 not?

3 MR. ELIE: The testimony on the record  
4 is a permanent bridge, that's what we have under  
5 oath today from Duke's witness. It's a permanent  
6 bridge. In fact, that was one of the benefits he  
7 pointed out that wasn't in Mr. Schultz' list.

8 So, having said that --

9 HEARING OFFICER FAY: Do you have  
10 questions tomorrow for Mr. Hamblin?

11 MR. ELIE: I don't --

12 HEARING OFFICER FAY: Mr. Hamblin, thank  
13 you, you are dismissed.

14 MR. HAMBLIN: So I can go back to  
15 Sacramento.

16 HEARING OFFICER FAY: You're both  
17 dismissed, Ms. Walker, as well.

18 MR. HAMBLIN: Thank you.

19 PRESIDING MEMBER KEESE: Mr. Fay, I know  
20 you indicated that you were happy to let the City  
21 off the hook tonight. And rather than having them  
22 go briefly. I am sort of going to concur that we  
23 have to do that.

24 I was hoping, for the purpose of  
25 scheduling from now on, that we could have

1 finished this item quite quickly. So, we'll start  
2 with it in the morning. We'll see how quickly we  
3 can go.

4 Obviously we've reached our deadline of  
5 what we can possibly do today.

6 HEARING OFFICER FAY: All right. We are  
7 adjourned until tomorrow morning at 9:00.

8 (Whereupon, at 6:04 p.m., the hearing  
9 was adjourned, to reconvene at 9:00  
10 a.m., Wednesday, March 13, 2002, at this  
11 same location.)

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## CERTIFICATE OF REPORTER

I, JAMES A. RAMOS, an Electronic Reporter, do hereby certify that I am a disinterested person herein; that I recorded the foregoing California Energy Commission Hearing; that it was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for any of the parties to said hearing, nor in any way interested in outcome of said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 5th day of April, 2002.

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